

CRIMINAL PROCEDURE

THIRD EDITION



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10

THE EXCLUSIONARY RULE AND ENTRAPMENT

Is the evidence that was seized by the police admissible in evidence?

A paper, claimed to be a warrant, was held up by one of the officers. [Miss Mapp] grabbed the “warrant” and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper, as a result of which they handcuffed appellant, because she had been “belligerent” in resisting their official rescue of the “warrant” from her person. Running roughshod over appellant, a policeman “grabbed” her and “twisted [her] hand,” and she “yelled [and] pleaded with him” because “it was hurting.” Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet, and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor, including the child’s bedroom, the living room, the kitchen, and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. . . .

Learning Objectives

1. Appreciate the significance of *Weeks v. United States*, *Wolf v. Colorado*, *Elkins v. United States*, and *Mapp v. Ohio*.
2. State the arguments for and against the exclusionary rule.
3. Know the procedure for invoking the exclusionary rule and the significance of the standing doctrine.
4. State the exceptions of the exclusionary rule: collateral proceedings, attenuation, good faith, independent source, inevitable discovery, and impeachment.
5. Know the difference between the objective and subjective tests for entrapment.

INTRODUCTION

The text of the Fourth Amendment is silent on the consequences of an unreasonable search and seizure. Should the evidence be excluded from trial? What of imposing a penalty on the police officers or compensating the subject of the unlawful search?

Historically, federal agents and state police who carried out unconstitutional searches and seizures were

subject to civil suits for the return of property or for damages, were criminally prosecuted, or were subjected to internal administrative discipline. These procedures had the advantage of focusing responsibility on the police officers who failed to follow the law. Critics of these remedies, however, argued that civil actions, criminal prosecutions, and disciplinary procedures



were ineffective in controlling police practices and that an alternative approach was required. Civil actions, for example, were expensive and rarely resulted in significant monetary awards for victims. Prosecutors were reluctant to bring criminal actions against the police, and law enforcement officials were equally hesitant to pursue administrative complaints against officers who may have carried out an unlawful search that led to a criminal conviction.

In 1914, in *Weeks v. United States*, the U.S. Supreme Court ruled that the Fourth Amendment required that evidence seized in an unlawful search was to be excluded from use as evidence in federal courts. In 1961, in *Mapp v. Ohio*, the U.S. Supreme Court sent shockwaves through the criminal justice system by extending the federal exclusionary rule to criminal trials in state and local courts. The Court explained that the exclusionary rule was required to deter the police from disregarding constitutional standards and to maintain the integrity of the judiciary by excluding unlawfully seized evidence from trials. The Supreme Court shortly thereafter held that the exclusionary rule was a judge-made remedy rather than a remedy that was guaranteed by the Fourth Amendment to the U.S. Constitution. The sole purpose of this judge-made exclusionary rule was to deter unreasonable searches and seizures.

The exclusionary rule has been one of the primary flashpoints in the debate over whether the American criminal justice system has gone too far in protecting criminal perpetrators while disregarding the interests of victims and society. Critics ask whether it makes sense to exclude reliable evidence from trial and thereby to permit criminal defendants to walk out the courthouse door without having to confront all the evidence against them.

In the first portion of this chapter, we trace the evolution of the exclusionary rule. Pay particular attention to development of the exclusionary rule following *Mapp v. Ohio*. Ask yourself whether the Supreme Court has unduly limited the exclusionary rule or has struck the proper balance. Keep in mind that the exclusionary rule applies to searches and seizures under the Fourth Amendment. As you may recall, evidence also may be excluded from trial based on the violation of other constitutional amendments. Two examples are the suppression of confessions and the suppression of in-court identifications.

- **Interrogations and identifications and the Fifth, Sixth, and Fourteenth Amendments.** Coerced confessions and confessions obtained in violation of *Miranda v. Arizona*, as well as confessions extracted in violation of the Sixth Amendment, are excluded from the prosecutor's case-in-chief.
- **Sixth Amendment.** A failure to provide an attorney at a lineup following the initiation of criminal proceedings results in the exclusion at trial of evidence from the lineup.

The second part of the chapter discusses entrapment. Entrapment is a defense to a criminal charge that is available to defendants who allege that they were induced to commit a crime by the government. We will first discuss the predisposition test that focuses on whether an individual's criminal conduct is the product of the creative activity of the government. The objective test, in contrast, is concerned with whether government conduct falls below the standard for the proper use of government power. Due process is a third test that is applied in those instances in which the conduct of the government is so unfair and outrageous that it is in violation of the Due Process Clause of the U.S. Constitution. As you read the second half of the chapter, consider which test for entrapment you consider to be the most fair and effective and which best deters governmental misconduct.

It may strike you as unusual that so much time is spent discussing the exclusionary rule and entrapment, given that both are infrequently applied by judges and appellate courts. This is due to the fact that these two doctrines raise important issues regarding the balance between the prosecution and the defense in the criminal justice system and pose the challenge of how to control and to provide a remedy for the violation of constitutional rights by the police. As you read this chapter, consider whether you favor the exclusionary rule and whether we should have an entrapment defense. Are there better alternatives?

THE EXCLUSIONARY RULE

As you have just read, the Supreme Court has extended the Fourth Amendment exclusionary rule to prosecutions in federal and state courts. The **exclusionary rule** provides that evidence that is obtained as a result of a violation of the Fourth Amendment prohibition on unreasonable searches and seizures is inadmissible in a criminal prosecution to establish a defendant's guilt. **Derivative evidence**, or evidence that is discovered as a result of the unlawfully seized items, is considered the **fruit of the poisonous tree** and also is excluded from evidence. For example, records of illegal drug transactions that are seized in the course of an unlawful search are excluded from evidence, because the records are the direct result of an illegal search. The confessions resulting from the interrogation of individuals whose names are listed as part of the drug transactions will be excluded from evidence as the fruit of the poisonous tree.



The exclusionary rule, in summary, excludes the following from trial:

- **Direct evidence.** Evidence that is directly derived from the unreasonable search
- **Fruit of the poisonous tree.** Evidence that is derived from the evidence that is directly seized

The exclusionary rule nevertheless remains controversial. Why the reluctance to exclude items that were unreasonably seized from evidence? The primary reason is that this might result in a guilty defendant being set free to rape, rob, and steal once again. What of the interests of victims and of society in the conviction of criminals? The next sections shed some light on why the Supreme Court embraced the exclusionary rule.

The Exclusionary Rule and Federal Courts

In *Weeks v. United States*, the Supreme Court held that evidence seized in the course of an unreasonable search that violates the Fourth Amendment is to be excluded from evidence in federal courts. The police arrested Weeks and searched his home without a warrant. They seized various personal papers that were turned over to the U.S. Marshal. Later that same day the police and U.S. Marshal searched Weeks's home a second time and seized various lottery tickets and letters that were used to convict Weeks for the use of the mails to transport lottery tickets in violation of federal law. Justice William R. Day ruled that the introduction of this evidence against the defendant violated the Fourth Amendment to the U.S. Constitution. He stressed that if letters and documents that are unlawfully seized from a defendant are introduced into evidence against that defendant at trial, the Fourth Amendment "is of no value" and "might as well be stricken from the Constitution." The efforts to bring the guilty to the bar of justice, "praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land" (*Weeks v. United States*, 232 U.S. 383, 392 [1914]). The question remained whether this same remedy was available against state law enforcement officers.

The Exclusionary Rule and State Courts

In 1949, in *Wolf v. Colorado*, the U.S. Supreme Court held that the requirements of the Fourth Amendment were incorporated into the Fourteenth Amendment and were applicable to the states. Justice Felix Frankfurter wrote that the "security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to a free society . . . [and] is therefore implicit in the concept of ordered liberty" (*Wolf v. Colorado*, 338 U.S. 25, 27, 33 [1949]).

The Supreme Court, however, also ruled that states were not required to exclude from trial evidence obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule, according to the opinion in *Wolf*, is not "an explicit requirement" of the Fourth Amendment and is a remedy created by the judiciary to maintain the integrity of the courtroom and to deter police disregard for the Fourth Amendment. In the words of Justice Frankfurter, "In a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." The Court pointed to the fact that virtually none of the countries in the English-speaking world recognized the exclusionary rule and that thirty states rejected the *Weeks* doctrine, while only seventeen were in agreement with *Weeks*. There was nothing in the U.S. Constitution to prevent these thirty states from continuing to rely on civil, criminal, and administrative remedies rather than the exclusionary rule to deter the police from engaging in unreasonable searches and seizures (30). Judge Benjamin Cardozo summarized the point of view in the thirty states that rejected the exclusionary rule when he wrote in a New York Court of Appeals decision that the "criminal [should not] go free because the constable has blundered" (*People v. Defore*, 150 N.E. 585, 587 [N.Y. 1926]).

Three Supreme Court judges dissented in *Wolf*, including Justice Frank Murphy, who strongly criticized his judicial brethren and wrote that he did not believe that the requirements of the Fourth Amendment should be determined by counting how many states or countries rely on the exclusionary rule. Justice Murphy warned that the decision in *Weeks*

will do inestimable harm to the cause of fair police methods in our cities and states. . . . It must have tragic effect upon public respect for our judiciary. For the Court now allows . . . shabby business: lawlessness by officers of the law. (46)

The Supreme Court, despite its decision in *Wolf*, was not prepared to hold that the Due Process Clause of the U.S. Constitution permitted state courts to admit evidence obtained in a blatantly unreasonable fashion. In the



case at issue in *Rochin v. California*, the police, suspecting that Rochin had swallowed capsules containing illegal narcotics, directed a doctor to force a vomiting-inducing solution into Rochin's stomach. The police subsequently discovered two morphine tablets. The Supreme Court ruled that the police conduct "shocked the conscience and violated the Due Process Clause of the Fourteenth Amendment" and that the morphine tablets should have been excluded from evidence. The Court explained that

illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . are methods too close to the rack and the screw to permit of constitutional differentiation. (*Rochin v. California*, 342 U.S. 165, 172 [1952])

The next important development following *Wolf* was a series of cases in which the Supreme Court limited the **silver platter doctrine**. This practice involved federal officials making an end run around the exclusionary rule by relying on evidence in federal prosecutions that had been seized by state officials in violation of the Fourth Amendment. The evidence was "served" by state law enforcement officers to federal prosecutors on a "silver platter." In 1960, the silver platter doctrine was ruled unconstitutional in *Elkins v. United States*. In *Elkins*, the Supreme Court proclaimed that the holding in *Wolf*—that the Fourteenth Amendment Due Process Clause prohibited unreasonable searches and seizures by state officials—marked the death knell for the silver platter doctrine.

For sure no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. (*Elkins v. United States*, 364 U.S. 206, 215 [1960])

The Supreme Court now was ready to take the final step of extending the exclusionary rule to the states. What arguments persuaded the court to change course?

The Extension of the Exclusionary Rule to the State Courts

In 1961, in *Mapp v. Ohio*, the U.S. Supreme Court ruled that the Fourth Amendment right to privacy, which is applicable to the states through the Fourteenth Amendment Due Process Clause,

is enforceable against [the states] by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then . . . the assurance against unreasonable . . . searches and seizures would be "a form of words."

The Court observed that an increasing number of states had adopted the exclusionary rule after concluding that other remedies had proven ineffective in deterring unreasonable searches and seizures. The Supreme Court also stressed that the exclusionary rule ensured judicial integrity by ensuring that courts would not become accomplices to disobedience to the Constitution that judges were sworn to uphold. The three dissenting judges, however, objected that the Supreme Court was unjustifiably imposing the exclusionary rule on state criminal justice systems (*Mapp v. Ohio*, 367 U.S. 643 [1961]).

Mapp clearly stated that the exclusionary rule is "part and parcel" and is "an essential part" of the Fourth Amendment, which is to be applied in cases of unreasonable searches and seizures that violate the Fourth Amendment (655). In a series of decisions following *Mapp*, the Supreme Court retreated from this position and held that the exclusionary rule is not constitutionally required and is a judge-made remedy developed to deter police disregard for the Fourth Amendment. In 1974, in *United States v. Calandra*, the Supreme Court, in an often-quoted statement, proclaimed that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved" (*United States v. Calandra*, 414 U.S. 338, 347 [1974]).

Why is this significant? The view that the exclusionary rule is a judge-made remedy means that the doctrine is not an ironclad requirement of the Constitution that judges are compelled to apply in every circumstance.

Mapp v. Ohio is the next case in the textbook. What were the reasons that the Supreme Court offered to explain why it extended the exclusionary rule to the states? Should states be left free to follow the remedies for unreasonable searches and seizures that they consider appropriate?



Should the exclusionary rule be extended to criminal prosecutions in the states?

Mapp v. Ohio, 397 U.S. 643 (1961), Clark, J.

Facts

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of section 2905.34 of Ohio's Revised Code. This law provides that

no person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture. . . . Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later, when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened, and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers.

Miss Mapp grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of [this] they handcuffed appellant, because she had been "belligerent" in resisting their official rescue

of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her and "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom, where the officers searched a dresser, a chest of drawers, a closet, and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor, including the child's bedroom, the living room, the kitchen, and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend a sense of justice,'" but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."

Issue

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial. In *Wolf v. Colorado* . . . this Court did indeed hold "that in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal, of which we have noted probable jurisdiction, it is urged once again that we review that holding.

Reasoning

Seventy-five years ago, in *Boyd v. United States* (116 U.S. 616, 630 [1886]), considering the Fourth and Fifth Amendments as running "almost into each other" on the facts before it, this Court held that the doctrines of those Amendments



apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his inalienable right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments].

The Court noted that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional."

Less than 30 years after *Boyd*, this Court, in *Weeks v. United States* (232 U.S. 383 [1914]), stated that

the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded as follows:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts

of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." This Court has ever since required of federal law officers a strict adherence to that command that this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard, without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .," and that such evidence "shall not be used at all."

The plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. In *Byars v. United States* (273 U.S. 28 [1927]), a unanimous Court declared that

the doctrine [cannot] . . . be tolerated under our constitutional system, that evidence of a crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.

The Court, in *Olmstead v. United States* (277 U.S. 438 [1928]), in unmistakable language restated the *Weeks* rule "that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." In *McNabb v. United States* (318 U.S. 332 [1943]), we noted that "a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. Colorado*, again for the first time, discussed the effect of the Fourth Amendment upon the states through the operation of the Due Process Clause of the Fourteenth Amendment. . . . After declaring that the "security of one's privacy against arbitrary



intrusion by the police” is “implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause,” and announcing that it “stoutly adhere[d]” to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the states as “an essential ingredient of the right.” The Court’s reasons for not considering essential to the right to privacy, as a curb imposed upon the states by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment’s limitation upon federal encroachment of individual privacy, were bottomed on factual considerations. . . .

The Court in *Wolf* first stated that “the contrariety of views of the States” on the adoption of the exclusionary rule of *Weeks* was “particularly impressive,” and, in this connection, that it could not “brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States’] relevant rules of evidence.” While in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. Significantly, among those now following the rule is California, which, according to its highest court, was “compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . .” In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the states was that “other means of protection” have been introduced to protect “the right to privacy.” The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*.

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the states in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling. Some five years after *Wolf*, in answer to a plea made here term after term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the states had “adequate opportunity to adopt or reject the [*Weeks*] rule.” . . . Today we once again examine *Wolf*’s constitutional documentation of the right to privacy

free from unreasonable State intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Since the Fourth Amendment’s right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth [Amendment], it is enforceable against them by the same sanction of exclusion as is used against the federal government. Were it otherwise, then just as without the *Weeks* rule, the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties. So too, without that rule, the freedom from State invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.”

At the time that the Court held in *Wolf* that the Amendment was applicable to the states through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers, the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* “stoutly adhered” to that proposition. . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence that an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.



Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the federal Constitution which it is bound to uphold. Moreover . . . "the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." . . . In nonexclusionary states, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the state's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. . . .

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches:

However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.

Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, . . . "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States* (277 U.S. 438, 485 [1928]),

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. The Court noted that the federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable.

Holding

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that 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. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Concurring, Douglas, J.

The Ohio Supreme Court sustained [Mapp's] conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." This evidence would have been inadmissible in a federal prosecution. . . . "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints. . . ." It was therefore held that evidence obtained (which



in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution. . . . If evidence seized in violation of the Fourth Amendment can be used against an accused, “his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.” When we allowed states to give constitutional sanction to the “shabby business” of unlawful entry into a home . . . we did indeed rob the Fourth Amendment of much meaningful force.

There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in *Wolf v. Colorado*,

Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meager the relief even if the citizen prevails. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the states, *Wolf v. Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to “a dead letter” . . . *Mapp v. Ohio* is an appropriate case in which to put an end to the asymmetry that *Wolf* imported into the law . . . because the facts it presents show . . . the casual arrogance of those who have the untrammelled power to invade one’s home and to seize one’s person.

Dissenting, Harlan, J., joined by Frankfurter, J., and Whittaker, J.

I would not impose upon the states this federal exclusionary remedy. [I]t is said that “the factual grounds upon which *Wolf* was based” have since changed, in that more States now follow the *Weeks* exclusionary rule than was so at the time *Wolf* was decided. While that is true, a recent survey indicates that at present one-half of the states still adhere to the common law nonexclusionary rule, and one, Maryland, retains the rule as to felonies. But in any case surely all this is beside the point, as the majority itself indeed seems

to recognize. Our concern here, as it was in *Wolf*, is not with the desirability of that rule but only with the question whether the states are constitutionally free to follow it or not. . . .

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience. . . . Problems of criminal law enforcement vary widely from state to state. One state, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing, because other remedies are unavailable or inadequate to secure compliance with the substantive constitutional principle involved. Another, though equally solicitous of constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial and dealing with constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy in that it reaches only unconstitutional intrusions that eventuate in criminal prosecution of the victims. Further, a state after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a nonexclusionary rule. . . . For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the states with an adamant rule that may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the *Weeks* rule on the states makes “very good sense” in that it will promote recognition by state and federal officials of their “mutual obligation to respect the same fundamental criteria” in their approach to law enforcement and will avoid “needless conflict between state and federal courts.” . . . I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from “arbitrary intrusion by the police” to suit its own notions of how things should be done. . . . The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the states. I do not see how it can be said that a trial becomes unfair simply because a state determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused.

In the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations that the Constitution places upon it and respects as well the principles inherent in its own processes. In the present case I think we exceed both and that our voice becomes only a voice of power, not of reason.



Questions for Discussion

1. Trace the development of the exclusionary rule from *Weeks* to *Wolf* to *Mapp*.
2. What reasons did the Supreme Court offer for extending the exclusionary rule to the states in *Mapp*?
3. Is the exclusionary rule more effective than other remedies in protecting Fourth Amendment rights?
4. Summarize Justice Harlan's dissent. Do you agree with Justice Harlan?
5. *Problems in policing.* As a police officer, you may find that you are uncertain about the lawfulness of a search. Would you be deterred from carrying out a search by the exclusionary rule? Which threat is the greatest deterrent—being sued for damages, being criminally prosecuted, or being administratively punished by the police department?

DEBATING THE EXCLUSIONARY RULE

The Justification for the Exclusionary Rule

A great deal of ink has been spilled by authors debating the merits of the exclusionary rule. Four arguments traditionally are offered in support of the exclusionary rule.

Constitutional rights. The Fourth Amendment protects individuals against unreasonable searches and seizures, and this safeguard would be seriously weakened if evidence seized in an unreasonable search is used against an accused at trial. Justice Tom Clark observed in *Mapp v. Ohio* that the exclusionary rule is an “essential ingredient” of the Fourth Amendment and that a failure to recognize the constitutional status of the exclusionary rule is to “grant the right but in reality to withhold its privilege and enjoyment” (655).

Deterrence. The exclusionary rule deters the police from disregarding constitutional procedures in future investigations. The Supreme Court noted in *Elkins v. United States* that the purpose of the exclusionary rule is to deter the police and to “compel respect for the constitutional guaranty in the only effectively available way . . . by removing the incentive to disregard it.” The Court noted that the exclusionary “rule is calculated to prevent [future violations], not to repair [past violations]” (*Elkins v. United States*, 304 U.S. 206, 217 [1940]).

Judicial integrity. Judges are charged with interpreting and protecting the Constitution of the United States, and confidence in the rule of law is promoted by the fair and equal enforcement of the law. Courts, for this reason, must not be seen to be turning a blind eye to lawbreaking by governmental officials. This is what is referred to as the imperative of judicial integrity. Supreme Court Justice Louis Brandeis, dissenting in *Olmstead v. United States*, observed in an often-cited statement that

the future 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 that pernicious doctrine this Court should resolutely set its face. (*Olmstead v. United States*, 277 U.S. 438, 468 [1928])

Social cost. The cost of excluding evidence has led police departments to stress the importance of *police professionalism* and to introduce training programs to ensure that law enforcement personnel follow Fourth Amendment procedures. The result is that a relatively small proportion of cases lead to the acquittal of defendants based on the exclusion of evidence. In those instances in which evidence is excluded and individuals are released, it is contended that it is better for society to bear this cost of governmental wrongdoing than to impose the cost on a defendant whose rights have been violated.

There are some equally strong arguments against the exclusionary rule. Examine the arguments presented in the next section and formulate your own opinion.



Arguments Against the Exclusionary Rule

There are a number of criticisms of the exclusionary rule. These criticisms taken together make the point that the exclusionary rule imposes a high cost on society in terms of the “loss” of evidence in criminal trials and thereby reduces rather than enhances respect for the criminal justice system.

Constitution. The Supreme Court has held that the exclusionary rule is a “judicially created remedy” that is intended to deter the police from engaging in unreasonable searches rather than a constitutionally required remedy that is “part and parcel” of the Fourth Amendment. This means that judges are free to limit or even abolish the exclusionary rule.

Deterrence. Former Chief Justice Warren Burger dismissed the notion that the exclusionary rule deters the police from violating Fourth Amendment rights as a “wistful dream.” The police are concerned with gathering evidence and with making arrests and do not stop to analyze whether a search satisfies the ever-changing and complicated standards for searches and seizures established by the Supreme Court. The immediate impact of an unreasonable search is felt by the prosecutor who loses evidence rather than by the police officer. It may take several years and the exhaustion of appeals for the legality of a search to be finally decided (*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 [1971]).

Judicial integrity. The exclusionary rule decreases respect for the judiciary by requiring courts to take the side of defendants rather than victims.

Truth seeking. The exclusionary rule undermines the purpose of a criminal trial, which is the determination of an individual’s guilt or innocence based on available and reliable evidence.

Penalizing victims. The protection of criminal defendants undermines rather than promotes respect for the criminal justice system. This was articulated by the U.S. Supreme Court in *Irvine v. California*. The Court noted that “rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . It protects [the suspect] against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches” (*Irvine v. California*, 347 U.S. 128, 136 [1954]).

Lack of flexibility. The exclusionary rule excludes evidence regardless of whether the police committed a technical violation of the law or engaged in a blatant and intentional violation of the Fourth Amendment. In both cases, the identical remedy is imposed: the exclusion of the evidence. As Chief Justice Burger observed, this equates the freeing of a tiger and a mouse in a schoolroom as equally serious offenses (*Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 419 [1971]).

Limited application. The exclusionary rule has no impact on the police in those instances in which the police seize a gun or drugs in order to remove the contraband from the streets and have no intention of pursuing a criminal prosecution. In this instance there is “no evidence to exclude” and “no penalty paid by the police.” The reasonableness of the search and seizure also often does not come to the attention of the courts when a defendant plea-bargains and enters a guilty plea in exchange for a lesser sentence or other consideration.

Alternative Remedies to the Exclusionary Rule

Critics of the exclusionary rule argue that deterrence may be more effectively achieved through various alternative procedures that do not require the exclusion of evidence from trial. Do you believe that any or all of the procedural mechanisms listed below will be more effective than the exclusionary rule in deterring unlawful Fourth Amendment searches?

Civil tort suits for damages against police officers who have engaged in unreasonable searches and seizures and the government: Civil actions against the police and state governments must overcome a number of difficult barriers to be successful. There also must be adequate monetary compensation provided to successful litigants to serve as an incentive for individuals to take the time and expense to file suit.

Criminal prosecution of the police for violation of civil liberties: Prosecutors may be reluctant to bring charges against police officers, particularly for relatively minor violations of the law.

Police administrative procedures subjecting officers to penalties that include demotions, fines, suspensions, and termination of employment: Police administrators may be hesitant to discipline officers and risk damaging morale, particularly when the evidence led to the arrest of dangerous criminals.



A *civilian review board* that examines cases of suspected abuse, which are referred to the board by defense lawyers and trial court judges: The panel would be composed of citizens, lawyers, judges, and police officials and would be authorized to impose penalties ranging from fines to termination from the police force. The police historically have been strongly opposed to outside review boards and complain that members of the board may not fully understand the demands and pressures of policing.

A *judicial hearing* conducted prior to the prosecution of the criminal charge: In the event that the judge concludes that a police officer carried out an unlawful search, the judge would be authorized to impose an appropriate penalty ranging from a fine or suspension to termination from the police force. A related proposal is to hold the hearing following the trial before the same judge and jury who heard the case. The judge would instruct the jury on the law, and they would decide whether the officer conducted an unlawful search. The judge then would impose an appropriate punishment. This approach saves the time and expense of gathering the facts. Critics point out that judges and juries will be influenced in their decision making by whether the trial ended in a conviction.

As we shall see later in the chapter, the Supreme Court has responded to criticisms of the exclusionary rule by creating various exceptions. The next section of the text discusses the process that a defense lawyer follows when seeking to suppress evidence under the exclusionary rule.

INVOKING THE EXCLUSIONARY RULE

The first step in challenging the reasonableness of a search is filing a pretrial motion to suppress. Most states and the federal courts place the burden of proof on the defendant when the search or seizure is based on a warrant. The burden of proof is reversed and is placed on the government when the police act without a warrant. Why? A warrant has been issued by a judge based on evidence presented by the government that meets the probable cause standard. The presumption is that the evidence on which the warrant is based satisfies the probable cause standard, and the defendant is assigned the heavy burden of demonstrating that the warrant is deficient. The defendant must demonstrate a lack of probable cause by clear and convincing evidence. In the case of a warrantless search, the police are aware of the evidence that constitutes probable cause and are in the best position to demonstrate the legality of the search. The government also bears the burden of proving that a search was justified as an exception to the warrant requirement.

A decision by the trial judge to admit the evidence results in the evidence being introduced at trial. Following a conviction, the defense may appeal and raise the issue of whether the judge made the correct decision in admitting the evidence. In contrast, the prosecution in most states is required to act immediately if it wishes to appeal a decision not to admit evidence. Why? Because the defendant may be acquitted at trial. At this point, the prosecution is prevented from subjecting the defendant to the double jeopardy of an additional trial. The lengthy appeal process, of course, may persuade the prosecutor to take his or her chances at trial without the evidence.

A decision by a judge to admit evidence that was challenged by a defendant on a timely motion to suppress constitutes error when the judge's decision is held by an appellate court to have been based on an incorrect analysis of the law. This requires a reversal of the guilty verdict unless the judge's admission of the evidence is considered to be **harmless error**. The prosecution will want to preserve the guilty verdict and will argue on appeal that the trial judge's decision is correct and, in any event, constitutes harmless error. This requires that the prosecution establish beyond a reasonable doubt that there is no reasonable probability that the evidence influenced the outcome of the trial (*Chapman v. California*, 386 U.S. 18 [1967]).

A defendant who has exhausted his or her state court appeals and finds that the appellate courts have affirmed the ruling of the trial court judge can look to an additional avenue of relief by filing a writ of habeas corpus with a federal district court or by pursuing a similar remedy in the state court. Habeas corpus is a request to the court to require the government to bring an individual who is in custody before the court to determine the legality of his or her detention. Access to the federal courts requires an allegation that an individual's detention resulted from a violation of his or her constitutional rights before trial or during trial. A defendant in custody also may rely on federal habeas corpus in those instances in which new information comes to light that indicates that the conviction was based on a constitutional violation. Habeas corpus is a complicated topic that we will cover in depth when we turn our attention to judicial appeals in Chapter 14 (*Stone v. Powell*, 428 U.S. 465 [1976]).

Standing

A defendant is required to have **standing** to challenge the introduction of evidence at trial. In other words, a defendant may be surprised to learn that he or she may not be eligible to contest the legality of a search. In 1969, in



Alderman v. United States, the U.S. Supreme Court held that Alderman did not have standing to suppress evidence obtained through an illegal wiretap of a codefendant's telephone conversation. The Supreme Court explained that the extension of standing to individuals whose personal rights have not been violated would significantly increase the costs of the exclusionary rule (*Alderman v. United States*, 394 U.S. 165, 175 [1969]). The legal test to be applied for standing in the case of an alleged violation of the Fourth Amendment prohibition on unreasonable searches and seizures is whether the defendant has both a subjective and an objectively reasonable expectation of privacy in the area that is subject to the search. The burden of proof typically is placed on the defendant. Below are some other examples of instances in which petitioners have lacked standing to suppress evidence.

Automobile passengers. A police officer stopped an automobile that he believed was fleeing the scene of a robbery. A search uncovered a box of rifle shells and a sawed-off shotgun under the front seat. The two petitioners were passengers, neither of whom owned the automobile. The Supreme Court ruled that the petitioners lacked an expectation of privacy in the glove compartment and under the seat and held that they lacked standing to suppress the evidence (*Rakas v. Illinois*, 439 U.S. 128 [1978]).

Overnight guests. The police entered a home without a warrant or consent looking for Olson, an overnight guest, who was wanted for suspected involvement in a murder-robbery. Olson was found hiding in a closet. The Supreme Court held that an overnight guest such as Olson possessed a reasonable expectation of privacy in the home. The Court held that "to hold that an overnight guest has a legitimate expectation of privacy . . . merely recognizes everyday expectations of privacy that we all share" (*Minnesota v. Olson*, 495 U.S. 91, 98 [1990]).

Possessory interest in items that are seized. The police directed Cox to empty the contents of her purse. Rawlings admitted that he owned a jar that was found in the purse containing 1,800 capsules of LSD. The Supreme Court held that Rawlings's possession of the drugs did not provide standing to challenge the search and seizure and that he was required to possess an expectation of privacy in the "area of the search," that is, the purse. Rawlings had met Cox only a few days before the search and had never before placed any items in Cox's purse. The Supreme Court also found it significant that Rawlings had no right to exclude other individuals from access to the purse, and in fact other individuals had freely rummaged through the purse (*Rawlings v. Kentucky*, 448 U.S. 98 [1980]).

Commercial transactions. Carter and Johns traveled from Chicago to the Twin Cities to meet with Thompson at her apartment. They had never before been in Thompson's apartment. The three of them spent two and a half hours bagging cocaine. A search of the apartment uncovered cocaine residue and plastic Baggies. The Supreme Court overturned the Minnesota Supreme Court's recognition of Carter's and Johns's standing to seek to suppress the evidence seized in Thompson's apartment. The Court based its decision on the commercial nature of the relationship, the brief period of time the two had spent on the premises, and the lack of a previous connection between Carter, Johns, and Thompson (*Minnesota v. Carter*, 525 U.S. 83 [1998]).

The target of a police investigation. In *United States v. Payner*, the U.S. Supreme Court held that Payner lacked standing to challenge the introduction of documents against him at trial that had been stolen by a private investigator from the briefcase of another individual as part of an Internal Revenue Service investigation of Payner (*United States v. Payner*, 447 U.S. 727 [1980]).



You can find *Minnesota v. Carter* on the Student Study Site, edge.sagepub.com/lippman3e.

The standing doctrine is a method of limiting the "cost" of the exclusionary rule by restricting the number of individuals who are eligible to challenge the introduction of the evidence. The Supreme Court also has limited the cost of the exclusionary rule by creating a number of exceptions to its application.

EXCEPTIONS TO THE EXCLUSIONARY RULE

We have seen that in *Mapp v. Ohio* the Supreme Court held that the exclusionary rule was a constitutional rule that was intended to deter the police and to protect the integrity of the courts. The U.S. Supreme Court, in 1974 in *United States v. Calandra*, modified this holding and held that the exclusionary rule is a judge-made remedy that is designed to deter unreasonable searches and seizures.

Calandra was followed by a number of cases in which the Supreme Court recognized exceptions to the exclusionary rule. These exceptions are based on a determination in each instance that the modest amount of additional deterrence to be gained from excluding the evidence from trial is outweighed by the cost to society of excluding the evidence from trial. As you read this section, pay particular attention to the Supreme Court's employment of this balancing test. Is the court's analysis based on hard facts or on speculation? Should the



Supreme Court have recognized these exceptions to the exclusionary rule? The next section of this chapter discusses the following exceptions:

- Collateral proceedings
- Attenuation
- Good faith
- Independent source
- Inevitable discovery
- Impeachment

Collateral Proceedings

The **collateral proceedings** exception permits the use of unlawfully seized evidence in proceedings that are not part of the formal trial (literally “off to the side” or “loosely related” to the trial). This includes bail hearings, preliminary hearings, grand jury proceedings, sentencing hearings, and habeas corpus review. What is the explanation for this exception? In most of these collateral proceedings, there is an interest in a full presentation of the facts. The application of the exclusionary rule would deny judges evidence that might prove useful in determining whether to charge a defendant with a criminal offense, in setting bail, or in sentencing a defendant. Balancing citizen protection against this is the fact that the Supreme Court has concluded that excluding the fruits of an unlawful search from these proceedings would have little additional impact in deterring police violations of the Fourth Amendment. The police already are deterred by the prospect that unlawfully seized evidence will not be available to establish a defendant’s criminal guilt at trial, and little additional deterrence will be achieved by excluding the evidence from collateral proceedings.

The Supreme Court also has ruled that evidence seized in an unreasonable search is admissible in *various non-criminal proceedings*. This includes parole revocation hearings, immigration hearings, and tax and other administrative proceedings. Unlawfully seized evidence also is admissible in forfeiture hearings, which are quasi-criminal proceedings in which the Court determines whether property is connected to certain specified crimes and therefore should be forfeited to the government. In each of these instances, the Supreme Court weighed the additional deterrence that would result from the exclusion of evidence against the costs of excluding the evidence and held that the price paid by society in excluding the evidence far outweighs the modest benefits in terms of deterrence.

Attenuation

In the typical case, there is a direct causal connection between an unreasonable search and the seizure of evidence. The evidence is the product of an unlawful search and therefore is excluded from evidence. In other instances, however, the connection between the search and the seizure of the evidence is **attenuated** (weak), and the U.S. Supreme Court has held that the exclusionary rule does not apply. A weak connection between the unlawful search and the seizure of evidence also is referred to as *dissipating the taint* or as **purging the taint** of the illegality. As early as 1939, in *Nardone v. United States*, the Supreme Court recognized that evidence seized as a result of an illegal search may be admissible where the “connection [has] . . . become so attenuated as to dissipate the taint” (*Nardone v. United States*, 308 U.S. 338, 341 [1939]).

An example of attenuation is *United States v. Boone*. In *Boone*, Officer Phil Barney executed an unlawful search of a vehicle driven by defendant Boone. The search led to the discovery of illegal narcotics, and as Barney stepped away from the car, defendants Boone and Greenfield sped away at an excessive speed. Barney followed in hot pursuit, and the defendants, facing imminent apprehension, threw narcotics out the window. The discarded narcotics were subsequently seized by the police. Should the drugs be excluded as the product of Officer Barney’s unreasonable search and seizure? The Tenth Circuit Court of Appeals ruled that the suspects’ tossing the drugs out the window was a voluntary act that broke the connection between the unlawful search and the discovery of the narcotics. As a result, the Tenth Circuit held that the drugs were admissible in evidence. The court observed that

Officer Barney’s initial illegal search did not cause the defendants to flee at a high rate of speed or to throw [the drugs] onto the highway. . . . It would be nonsensical to hold that officer Barney had no right to collect the evidence of drug possession that defendants voluntarily discarded onto the highway. (*United States v. Boone*, 62 F.3d 323, 326 [10th Cir. 1995])

In *Brown v. Illinois*, the Supreme Court articulated three circumstances that determine whether there is an *attenuation of the taint* of an unlawful search (*Brown v. Illinois*, 422 U.S. 590, 603 [1975]). As you can see from



these three factors, shown below, attenuation will be found when there is a significant passage of time between the initial illegality and the discovery of the evidence or where a number of factors intervene as well as in those instances in which the police mistakenly or unintentionally misinterpreted the law.

In *Kaupp v. Texas*, the police, without probable cause, entered Robert Kaupp's bedroom at 3 a.m., handcuffed him, and took him to police headquarters. On the way to the police station, the police drove Kaupp to the location where they discovered the victim's body. At the police station, Kaupp was interrogated, was confronted with the confession of his co-confederate, and confessed. The Court, in excluding Kaupp's confession from evidence, held that "there is no indication . . . that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation. In the interim, he remained in his partially clothed state in the physical custody of a number of officers, some of whom, at least, were conscious that they lacked probable cause to arrest" (*Kaupp v. Texas*, 538 U.S. 628 [2008]).

Temporal proximity. A lengthy period of time attenuates the taint. In *Ceccolini*, the police illegally seized evidence that led them to a witness who testified for the prosecution at trial. The Supreme Court ruled that the four-month period between the initial illegality and the interrogation of the witness attenuated the taint and that the testimony was properly admitted at trial (*United States v. Ceccolini*, 435 U.S. 268 [1978]).

Intervening circumstances. Intervening events that weaken the connection between the unlawful search and the evidence that is seized may attenuate the initial taint. Independent and voluntary acts of individuals, for instance, may break the chain of causation. This is illustrated in *Boone* by the intervening events of the suspects' fleeing from the scene of the initial search and by their throwing the drugs out the window. In contrast, reading the *Miranda* warnings to a suspect and brief visits by friends and family have not been found to break the chain of causation of an illegal arrest.

Intentional violation. Judges resist finding attenuation where the police intentionally violate the law. A finding of attenuation would reward a conscious disregard of legal standards. In *Brown*, the police broke into the defendant's apartment, illegally arrested him at gunpoint without probable cause, and obtained a confession after reading him his *Miranda* rights. The Supreme Court stressed that the

illegality here . . . had a quality of purposefulness. The impropriety of the arrest was obvious. . . . The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion. . . . The deterrent purpose of the exclusionary rule would be well-served by excluding the subsequent confessions. (*Brown v. Illinois*, 322 U.S. 590, 592–595, 603–604 [1975])

Constitutional interest. In *Hudson v. Michigan*, the U.S. Supreme Court articulated a *constitutional interest* test for attenuation. The Court stated that evidence is admissible at trial when the police fail to follow a constitutional requirement under the Fourth Amendment that serves to protect an individual's privacy in the home rather than to protect an individual against unreasonable searches and seizures.

The Supreme Court in *Hudson* held that the requirement that the police knock and announce their presence and wait a reasonable period of time before executing a search warrant is intended to protect individuals against unannounced violations of the privacy of the home rather than to protect individuals against unreasonable searches and seizures. As a result, evidence seized following a failure to knock and announce should not be excluded from evidence. The Court stated that "even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained" (*Hudson v. Michigan*, 547 U.S. 586 [2006]).

There is one last point to keep in mind: Courts are less inclined to find that a taint is attenuated in regard to a witness's testimony than in the case of physical evidence. Why? The cost of excluding a witness's testimony significantly harms the prosecution's case, and many witnesses undoubtedly would have voluntarily come forward and testified on behalf of the government after learning of the prosecution.

We now review the important and complicated 1963 case of *Wong Sun v. United States*. The U.S. Supreme Court in *Wong Sun* articulated the rule that has guided judicial decisions on attenuation: "whether, granting establishment of the primary illegality, the evidence by which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." This test asks whether the evidence was the direct result of an unlawful search and should be excluded from evidence or was so far removed from the unlawful search that it should be admitted into evidence (*Wong Sun v. United States*, 371 U.S. 471, 486 [1963]).

In the case at issue in *Wong Sun*, federal narcotic agents illegally arrested James Toy in the bedroom in the rear of his laundry. Toy, in turn, implicated Johnny Yee as a drug dealer; Yee was arrested, and several tubes of heroin



were seized in his home. Yee, in turn, stated that he had obtained the drugs from Toy and Wong Sun. Wong Sun subsequently was arrested in the back room of his apartment by six officers. Yee, Toy, and Wong Sun all were charged with narcotics offenses, and Wong Sun was released on his own recognizance. Wong Sun later voluntarily returned, was interrogated, and provided statements to federal narcotics agents (473–478). The Supreme Court was asked to disentangle this knotty case and to rule on whether the narcotics and Wong Sun’s confession were the fruits of the poisonous tree of what the defense alleged was Toy’s illegal arrest.

Toy’s statement. The Supreme Court ruled that the police lacked probable cause to enter Toy’s laundry and to arrest him. The Government argued that Toy’s statement implicating Yee was an “act of free will” that purged the taint of the unlawful invasion. The Supreme Court, however, rejected the Government’s argument. Six or seven officers had broken down the door and followed Toy into the bedroom. He was immediately handcuffed and arrested. The Court held that “it is unreasonable to infer that Toy’s response was sufficiently an act of free will to purge the primary taint of the unlawful invasion” (486).

Seizure of narcotics from Yee. Was there a direct relationship between Toy’s statement and the seizure of the narcotics from Yee? The Supreme Court held that the police would not have seized the narcotics absent Toy’s statement and that the drugs had been detected through the “exploitation of that illegality” (i.e., the illegal arrest of Toy) and accordingly should be excluded from evidence (487).

Wong Sun’s statement. Wong Sun’s unsigned confession was not considered to be the fruit of the poisonous tree and was properly admitted into evidence at trial. Wong Sun was released on his own recognizance after his arraignment and returned voluntarily several days later to make the statement. The Supreme Court held that the connection between the arrest and the statement was “so attenuated as to dissipate the taint” (491).

Hudson v. Michigan, discussed above, is one of the Supreme Court’s most recent decisions on attenuation. As you read *Hudson* on the Student Study Site, pay attention to the Supreme Court’s weighing of the benefits and costs of applying the exclusionary rule. What will be the impact of this decision on the protections afforded to individuals under the exclusionary rule?

Cases and Comments

Miranda and Attenuation. Defendant Patane was arrested outside his home and handcuffed. A federal agent had been informed that the defendant, a convicted felon, possessed a Glock pistol. The agent began giving the *Miranda* warning and was interrupted by the defendant who stated that he knew the rights. The defendant then informed the officer that “the Glock is in my bedroom on a shelf.” . . . The agent seized the pistol and the defendant was indicted and convicted for being a felon in possession of firearm in violation of federal law.

The government acknowledged on appeal that Patane had not been fully and effectively informed of his *Miranda* rights, and the Tenth Circuit Court of Appeals held that the pistol and the defendant’s statement were both inadmissible into evidence. Justice Clarence Thomas, writing for the Court majority, held that a failure to provide the *Miranda* warnings does not violate a suspect’s constitutional rights. Violations occur only “upon the admission of unwarned statements into evidence at trial.” Justice Thomas further ruled that the introduction into evidence of the “non-testimonial fruit” of a voluntary statement, such as Patane’s Glock, does not violate the Self-Incrimination

Clause. The Self-Incrimination Clause prohibits compelling a defendant to be a “witness against himself.” The term witness, according to Justice Thomas, restricts the right against self-incrimination to testimonial evidence. Nontestimonial evidence, such as a gun, is unable to “bear witness” against an accused.

Justice Souter, with whom Justices Stevens and Ginsburg joined in dissent, proclaimed that “in closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*, the majority adds an important inducement for interrogators to ignore the rule in that case.” The dissenting judges argued that a failure to provide the *Miranda* warning raises a presumption that a confession is involuntary, and the confession as well as the fruits of the seizure of the evidence should be excluded from evidence. The dissenters concluded that the decision in *Patane* must be viewed as an “unjustifiable invitation to law enforcement to flaunt *Miranda* when there may be physical evidence to be gained.”

How does *Patane* illustrate the attenuation doctrine? Do you agree with the decision? See *United States v. Patane*, 542 U.S. 630 (2004).

You can find *Hudson v. Michigan* and *United States v. Patane* on the Student Study Site, edge.sagepub.com/lippman3e.



Good Faith Exception

In 1976, Supreme Court Justice Byron White, in dissenting in *Stone v. Powell*, argued that the exclusionary rule should not be applied where evidence is unlawfully seized by an officer acting in the “good faith belief” that his or her conduct complies with the Fourth Amendment and the officer has reasonable grounds for his or her belief. Justice White explained that a police officer who believes that he or she is acting lawfully will not be deterred by the prospect that unlawfully seized evidence will be excluded from evidence at trial. He concluded the only thing that is accomplished by withholding the evidence from the jury is interference with the “truth-finding function” of the trial. Briefly stated, the exclusionary rule under these circumstances provides little benefit while exacting a significant cost (*Stone v. Powell*, 428 U.S. 465, 540 [1976]). In 1984, in *United States v. Leon*, the Supreme Court recognized the **good faith exception** to the exclusionary rule. In the last three decades, the Court has relied on the good faith exception to uphold the constitutionality of searches in five circumstances. In each of these cases, the police were found to have acted with an honest and objectively reasonable belief in the legality of the search.

- **Reliance on a warrant.** The police reasonably, but incorrectly, believed that the search warrant issued by the judge was based on probable cause (*United States v. Leon*).
- **Reliance on assurance by a judge that a warrant meets Fourth Amendment standards.** The police reasonably, but incorrectly, relied on the assurance of a judge that a warrant met the requirements of the Fourth Amendment (*Massachusetts v. Sheppard*).
- **Reliance on legislation.** The police reasonably relied on a statute that later was declared unconstitutional (*Illinois v. Krull*).
- **Reliance on data entered into a computer by a court employee.** A police officer reasonably relied on computer information that was incorrectly entered by a court employee (*Arizona v. Evans*).
- **Reliance on apparent authority of a third party to consent.** The police reasonably, but incorrectly, believed that an individual possessed the authority to consent to an entry of his or her home (*Illinois v. Rodriguez*).

Reliance on a warrant. In 1984, in *United States v. Leon* (468 U.S. 897 [1984]), Justice White along with five other members of the Supreme Court recognized the good faith exception to the exclusionary rule. In the incident at issue in *Leon*, an informant alerted the police that he had witnessed a drug sale at a home in Burbank, California, five months previously. He reported that the suspects stored cash and narcotics in homes in Burbank. The police subsequently placed the residences and suspects under surveillance, and their observations appeared to corroborate the informant’s information. They secured a warrant from a judge, searched the residences, seized drugs and a large amount of cash, and charged the defendants with conspiracy to possess and distribute cocaine as well as a variety of other criminal counts. A federal district court held a hearing and suppressed use of the narcotics as evidence. The judge ruled that the affidavit supporting the warrant failed to establish the informant’s reliability and credibility and did not constitute probable cause (901–905).

The U.S. Supreme Court nevertheless held that the police had acted in objectively reasonable good faith reliance on the warrant and that application of the “extreme sanction of exclusion is inappropriate.” The Court explained 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” (922, 926).

What is the test for a good faith belief in the lawfulness of a search? In determining whether an officer acted in good faith, the Supreme Court instructed that courts should ask whether “a reasonably well trained officer would have known that the search was illegal” despite the warrant issued by a judge. The Court found that the police in *Leon* carried out a thorough and responsible investigation and obtained a warrant in good faith and, in the view of the Supreme Court, reasonably believed that their search of the homes was based on a warrant founded on probable cause.

Officers would not be acting in good faith, and suppression would be appropriate, in those instances in which

- the police clearly are aware or should be aware that the warrant lacks probable cause. This would arise in situations in which the police knew or should have known that the information in the affidavit was false or that the information did not meet the probable cause standard.
- the warrant is “fatally flawed.” For instance, the warrant may not be specific in terms of the place to be searched or the items to be searched for.
- the judge issuing the warrant is not “neutral and detached” and acts as a “rubber stamp for the police” or as “an arm of the prosecution” (914–922).



Reliance on assurance by a judge that a warrant meets Fourth Amendment standards. In the companion case of *Massachusetts v. Sheppard*, the Supreme Court affirmed that the exclusionary rule should not be applied in those cases in which the police act in good faith reliance on the assurance of a judge that a warrant, which later is determined by an appellate court to be defective, constitutes sufficient authority to carry out a search (*Massachusetts v. Sheppard*, 468 U.S. 981 [1984]).

The officers sought an arrest warrant for the search and seizure of items in Sheppard's residence linking him to a homicide. Detective O'Malley was able to locate only a warrant form authorizing the seizure of a "controlled substance." The judge told the police that he would make the necessary changes to ensure that the warrant authorized a search for evidence of a murder. However, the judge did not modify that portion of the warrant that authorized a search for controlled substances and failed to incorporate the police officer's affidavit listing the items that the police were seeking in the home. As a result, the warrant authorized the police to seize unspecified controlled substances and did not authorize the seizure of various items that linked Sheppard to the homicide. As a result, the homicide evidence was suppressed by the trial court judge. The Supreme Court held that although the warrant clearly authorized a search for narcotics, a police officer should not be expected to "disbelieve a judge who has just advised him . . . that the warrant he possesses authorized him to conduct the search he requested" (984–991).

Justices Brennan and Marshall objected in their dissent that the exclusionary rule was part of the protections included in the Fourth Amendment, and they called for a restoration of the principle recognized in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a constitutional right to prevent the government from making use of any evidence obtained through illegal police conduct (928–941).

Reliance on legislation. The Supreme Court nevertheless continued to expand the application of the good faith exception. In 1987, in *Illinois v. Krull*, the Court held that evidence seized in objectively reasonable reliance on a statute later held to be unconstitutional was admissible at trial. The Court stated that "unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law" (*Illinois v. Krull*, 480 U.S. 340, 349–350 [1987]). The Court asked whether excluding the evidence from trial would deter the legislature from passing unconstitutional statutes in the future. The Supreme Court reasoned that legislatures are motivated by public opinion and politics and are relatively unconcerned about the fate of a statute in the courts. As a result, legislators are unlikely to be deterred from passing unconstitutional laws in the future by the court's exclusion of the evidence from trial. Balanced against this was the significant cost of excluding evidence that had been seized in good faith by the police (352).

In *Heien v. North Carolina*, the Supreme Court held that a police officer's reasonable suspicion stop of an automobile based on a mistaken although objectively reasonable interpretation of a *state statute* as requiring two working brake lights rather than a single brake light did not violate the Fourth Amendment. As a result, the narcotics seized in a consent search were admissible in evidence. See *Heien v. North Carolina*, 135 S. Ct. 530, 547 U.S. ____ (2014).

Reliance on data entered into a computer by a court employee. In 1995, in *Arizona v. Evans*, the U.S. Supreme Court was asked to apply the good faith exception to an arrest executed by Phoenix police officer Bryan Sargent. Officer Sargent reasonably relied on information that he downloaded from the computer terminal in his squad car. The computer erroneously indicated that Isaac Evans, whom Officer Sargent had pulled over for driving the wrong way on a one-way street, was the subject of an outstanding misdemeanor arrest warrant. Evans was placed under arrest, and while he was being handcuffed, he dropped a marijuana cigarette. A search of Evans's automobile led to the seizure of a bag of marijuana that had been concealed under the front seat. It later was found that the arrest warrant had been quashed roughly seventeen days prior to his arrest. The Supreme Court noted that these types of errors occur on isolated occasions and that suppressing the evidence will not deter court clerks from making similar mistakes in the future (*Arizona v. Evans*, 514 U.S. 1 [1995]).

Reliance on apparent authority of a third party to consent. In *Illinois v. Rodriguez* (this case appears in Chapter 6 under consent searches), Gail Fischer reported to the police that she had been the victim of domestic violence by Edward Rodriguez. She told the officers that he was at "our" apartment, where she had clothes and furniture. Fischer took the police over to the apartment. She let them in with her key, and they subsequently seized narcotics that they spotted in plain view and arrested Rodriguez. The contraband was suppressed on the grounds that Fischer lacked "common access and control for most purposes," which is the requirement for a third-party consent. Her name was not on the lease or mailbox, and she did not pay rent, only occasionally spent the night, and never entertained friends at the apartment. The Supreme Court reversed and held that the police "reasonably believed" that Fischer possessed authority to consent to a search of the apartment. See *Illinois v. Rodriguez*, 497 U.S. 177 (1990).



Reliance on a precedent that is overturned. In *Davis v. United States*, 131 S. Ct. 2419, 564 U.S. ___ (2011), the Supreme Court addressed whether the exclusionary rule applies to evidence that is seized by a police officer who conducts an “objectively reasonable” search based on a binding precedent that later is overruled. For almost thirty years of searching automobiles, the police followed *New York v. Belton*, which held that as a contemporaneous incident of an arrest, the police may search the passenger compartment of the automobile (*New York v. Belton*, 453 U.S. 454 [1981]). In 2009, in *Arizona v. Gant*, the Supreme Court modified *Belton* and held that a “recent occupant’s arrest” is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains “evidence of the offense of arrest” (*Arizona v. Gant*, 556 U.S. 332, 351 [2009]).

In 2007, police officers in Greenville, Alabama, conducted a routine traffic stop and arrested Stella Owens for driving while intoxicated and arrested the passenger, Willie Davis, for giving a false name to the police. The police handcuffed Owens and Davis and placed them in the back of separate patrol cars. The officers followed *Belton*, searched the passenger compartment of the vehicle, and found a revolver inside the pocket of Davis’s jacket.

Davis was indicted and convicted of possession of a firearm by a convicted felon. During Davis’s appeal of his conviction, the Supreme Court decided *Gant*. Justice Samuel Alito, writing in a 7–2 decision in *Davis v. United States*, stated that “[e]xcluding evidence in such cases does not deter police misconduct and imposes substantial social costs.” The Court accordingly held that “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply” (131 S. Ct. 2419, 564 U.S. ___ [2011]). Does *Davis* undermine the Fourth Amendment by recognizing that Davis’s Fourth Amendment rights were violated while denying him a remedy under the exclusionary rule?

In summary, in each of the cases in which the Supreme Court recognized the good faith exception, the police reasonably believed that they were complying with the law. In both *Leon* and *Sheppard*, they acted in a diligent and responsible fashion based on warrants that later proved to be defective. In *Krull*, the police relied in good faith on a state statute that later was ruled to be unconstitutional, and the police officer in *Evans* acted on the basis of inaccurate computer information. The officers in *Davis* followed a binding precedent that was overturned by the Supreme Court while the case was on appeal. In any of these cases, would you have excluded the evidence from trial?

In 2009, in *Herring v. United States*, the next case in the text, the U.S. Supreme Court confronted the question of whether the good faith exception should be applied when a law enforcement officer makes an arrest based on an error in the police electronic database. The defense argued that the good faith exception should not be recognized when the police are responsible for the mistake.



You can find *United States v. Leon*, *Arizona v. Evans*, and *Davis v. United States* on the Student Study Site, edge.sagepub.com/lippmanpc3e.

Did the officer act in good faith in relying on a police database that falsely indicated that there was an arrest warrant for the defendant?

Herring v. United States, 555 U.S. 135 (2009), Roberts, J.

Issue

The Fourth Amendment forbids “unreasonable searches and seizures,” and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution. The issue is whether the exclusionary rule should be applied.

Facts

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff’s Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county’s warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring’s arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County’s computer database, Morgan replied that there was an active arrest warrant for Herring’s failure to appear on a felony charge.



Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled, the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mix-up, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and for drugs violations. He moved to suppress the evidence on the ground that his initial arrest had been illegal, because the warrant had been rescinded. The magistrate judge recommended denying the motion, because the arresting officers had acted in a good faith belief that the warrant was still outstanding. Thus, even if there were a violation, there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." The Court of Appeals for the Eleventh Circuit affirmed. . . .

Reasoning

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," but it "contains no provision expressly precluding the use of evidence obtained in violation of its commands." Nonetheless, our decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial. We have stated that this judicially created rule is "designed to safeguard rights generally through its deterrent effect."

The fact that a violation occurred—that is, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion "has always been our last resort, not our first impulse," and our precedents establish

important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "result[s] in appreciable deterrence." We have repeatedly rejected the argument that exclusion is a necessary consequence of a violation. Instead we have focused on the efficacy of the rule in deterring violations in the future.

In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." "To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that "offends basic concepts of the criminal justice system." "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."

These principles are reflected in the holding of *Leon*: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance "good faith." In a companion case, *Massachusetts v. Sheppard*, we held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make "clerical corrections" to it.

Shortly thereafter, in *Krull*, we extended these holdings to warrantless administrative searches performed in good faith reliance on a statute later declared unconstitutional. Finally, in *Evans*, we applied this good faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding. We held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct, court employees were unlikely to try to subvert the Fourth Amendment, and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors. *Evans* left unresolved "whether the evidence should be suppressed if police personnel were responsible for the error," an issue not argued by the State in that case, but one that we now confront.

The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, "An assessment of the flagrancy of the police misconduct constitutes an important



step in the calculus” of applying the exclusionary rule. Similarly, in *Krull* we elaborated that “evidence 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.’”

Anticipating the good faith exception to the exclusionary rule, Judge Friendly wrote that “the beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights. . . . The deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of rights.”

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Mapp v. Ohio*, which extended the exclusionary rule to the states, officers forced open a door to Ms. Mapp’s house, kept her lawyer from entering, brandished what the court concluded was a false warrant, and then forced her into handcuffs and canvassed the house for obscenity. “The situation in *Mapp*” featured a “flagrant or deliberate violation of rights.” . . . [S]ince *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level. The pertinent analysis of deterrence and culpability is objective, not an “inquiry into the subjective awareness of arresting officers.” We have already held that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal” in light of “all of the circumstances.” . . . We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon* we held 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.” The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.

If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future

false arrests, exclusion would certainly be justified under our cases should such misconduct cause a violation. . . . In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system. . . . But there is no evidence that errors in Dale County’s system are routine or widespread. Officer Anderson testified that he had never had reason to question information about a Dale County warrant, and both Sandy Pope and Sharon Morgan testified that they could remember no similar miscommunication ever happening on their watch. That is even less error than in the database at issue in *Evans*, where we also found reliance on the database to be objectively reasonable. . . . [T]he Eleventh Circuit was correct to affirm the denial of the motion to suppress.

Holding

Petitioner’s claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” In such a case, the criminal should not “go free because the constable has blundered.” The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

Dissenting, Ginsburg, J., joined by Stevens, J., Souter, J., and Breyer, J.

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only data from the updated National Crime Information Center (NCIC), but also terrorist watch lists, the federal government’s employee eligibility system, and various commercial databases. . . . Law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watch list databases, and databases associated with the federal government’s employment eligibility verification system.

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. “The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed



to maintain an accurate computer data base” is evocative of the use of general warrants that so outraged the authors of our Bill of Rights. Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule “is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.”

Dissenting, *Souter, J.*

In *Arizona v. Evans*, we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon the court clerk’s recordkeeping. The rationale for our decision was premised on a distinction between judicial errors and police errors. . . . I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a violation of the Fourth Amendment.

Questions for Discussion

1. Summarize the facts in *Herring*.
2. Chief Justice Roberts bases the decision on the deterrence function of the exclusionary rule. Explain why he argues that to trigger the exclusionary rule, the police conduct must be “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” Why does the conduct of Investigator Anderson not meet this legal standard?
3. Are there some situations in which Justice Roberts would apply the exclusionary rule to an arrest and search and seizure based on what later proved to be an error in police recordkeeping? In your answer, pay attention the distinction between a subjective belief and an objectively reasonable belief in the accuracy of a database.
4. Can you explain why Justice Roberts writes that the error in recordkeeping was “nonrecurring” and “far removed” from the “core concerns” that led to the adoption of the exclusionary rule? Would the exclusionary rule apply to a situation in which Investigator Anderson had arrested Herring based on his own belief that there was an outstanding arrest warrant for Herring?
5. Why does the dissent argue that the application of the exclusionary rule in *Herring* may serve a beneficial deterrent function? Is Justice Ginsburg right to be concerned about the consequences of a failure to apply the exclusionary rule for the civil liberties of Americans? Should the exclusionary rule apply to violations of the Fourth Amendment regardless of the police officer’s good faith belief that he or she is acting lawfully?
6. *Problems in policing*. Summarize the good faith exception to the exclusionary rule. A number of state courts have ruled that their constitutions require that searches be carried out only on probable cause and accordingly have rejected the good faith exception established in *Leon*. These include Connecticut, Delaware, Georgia, Idaho, Iowa, Montana, New Hampshire, New Jersey, Pennsylvania, South Carolina, and Vermont. Do you agree that courts should not recognize a good faith exception?

You Decide



10.1 Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and the “premises known as 2036 Park Avenue third floor apartment.” The police reasonably believed that there was only a single apartment on the third floor. This was based on information provided by a reliable informant, by visually examining the building, and by checking with the utility company. The third floor in fact was divided into two apartments, one occupied by McWebb and one occupied by Garrison. Six Baltimore police officers executed the warrant; they encountered McWebb in the front of the

building and used his key to enter the building. As they entered the vestibule on the third floor, they encountered Garrison. The doors to both apartments were open, and they could see into the interior of both McWebb’s apartment to the left and Garrison’s apartment to the right. It was only after entering Garrison’s apartment and seizing heroin, cash, and drug paraphernalia that the police realized that the third floor contained two apartments and that they were searching the “wrong unit.”

Was the search and seizure of Garrison’s apartment lawful based on the police officers’ reasonable belief that the third floor was one large unit? See *Maryland v. Garrison*, 480 U.S. 79 (1987).

You can learn what the Court decided by referring to the Student Study Site, edge.sagepub.com/lippmancp3e.

Independent Source

We have seen that evidence that is directly obtained as a result of an unconstitutional search is excluded from evidence at trial. The **independent source doctrine** provides that evidence that is unlawfully seized nevertheless is



admissible where the police are able to demonstrate that the evidence was *also* obtained through *independent* and *lawful* means. In *Silverthorne Lumber Company v. United States*, the U.S. Supreme Court held that facts obtained through a constitutional violation are not “inaccessible. If knowledge of them [also] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government’s own wrong cannot be used by it” (*Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392 [1920]). Supreme Court Justice Antonin Scalia explained the independent source doctrine as follows: “Where an unlawful entry has given investigators knowledge of facts x and y [and z], but fact z [also] has been learned by other [lawful] means, fact z can be said to be admissible because [it is] derived from an ‘independent source’” (*Murray v. United States*, 487 U.S. 533, 538 [1988]).

In 1984, in *Nix v. Williams*, the U.S. Supreme Court stated that

the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been had no police error or misconduct . . . occurred. (*Nix v. Williams*, 467 U.S. 431, 444 [1984])

In other words, while the government is prohibited from using evidence obtained from the illegal search, this should not deprive the jury of hearing the same evidence so long as it can be demonstrated that the evidence also was obtained as a result of an independent and legal search.

The leading case on the independent source doctrine is *Murray v. United States*. In the case at issue in *Murray*, federal agents received information that a warehouse was being used for illegal drug activities. Law enforcement agents placed the warehouse under surveillance, developed probable cause, unlawfully entered the premises without a warrant, and observed bales of marijuana. The agents then left and applied for a warrant. The warrant application did not refer to the illegal entry or rely on information obtained during the illegal entry. The police then entered the warehouse with a warrant and seized the marijuana based on the information provided by the informant (487 U.S. 533, 535–546 [1988]).

Justice Scalia observed that the agents’ “lawful search appeared to be genuinely independent of the earlier tainted one.” He remanded the case to clarify whether the two searches were truly independent and posed two questions to the lower court: whether the decision to seek a warrant was “prompted” by what they had seen during the initial entry, and whether information obtained during that entry was “presented to the Magistrate and affected his decision to issue the warrant” (543). Can you explain why Justice Scalia wanted the appellate court judge to address these two questions?



You can find *Murray v. United States* on the Student Study Site, edge.sagepub.com/lippman3e.

Inevitable Discovery Rule

The **inevitable discovery rule** provides that evidence that is seized as the result of an unconstitutional search is admissible where the government can prove by the preponderance of the evidence that the evidence would have been inevitably discovered in the same condition in a lawful fashion. In *Nix v. Williams*, the Supreme Court explained that the independent source doctrine and the inevitable discovery rule both are based on the proposition that the police would have lawfully obtained the evidence had the police misconduct not taken place and that the government should not be punished by the exclusion of the evidence. In both instances, the government has not benefited by its wrongful behavior, and the defendant has not suffered any harm.

The inevitable discovery rule was first fully articulated by the Supreme Court in *Nix v. Williams*. In *Nix*, the defendant Williams was interrogated by Officer Leaming in violation of Williams’s Sixth Amendment right to counsel. Williams subsequently led the police to the location of the body of his ten-year-old victim, Pamela Powers. The police called off their two-hundred-person search for Pamela’s body following Williams’s promise to cooperate with the police. At the time, the Supreme Court observed that

one search team . . . was only two and one-half miles from where Williams soon guided Leaming and his party to the body. . . . It is clear that the search parties were approaching the actual location of the body, and we are satisfied . . . that the volunteer search teams would have resumed the search had Williams not . . . led the police to the body and the body inevitably would have been found [within an estimated three to five hours]. (*Nix v. Williams*, 467 U.S. 431, 436, 448 [1984])

Justices Brennan and Marshall in dissent noted that the independent source doctrine was distinguished from the inevitable discovery rule by the fact that the evidence introduced at trial because of the independent source exception is in fact obtained by lawful means, while the evidence introduced at trial because of the inevitable



You can read *Nix v. Williams* on the Student Study Site, edge.sagepub.com/lippmanpc3e.

discovery rule has not yet been discovered. The dissenters noted that the inevitable discovery exception “necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule.” Justices Brennan and Marshall would require the government to satisfy a high standard of proof before admitting evidence under the inevitable discovery rule in order to “impress the fact finder with the importance of the decision and thereby reduce the risk that illegally obtained evidence will be admitted” (459–460).

Courts have divided over whether a legal search must already have been under way at the time of the unlawful police behavior in order to establish that evidence inevitably would have been discovered. In *United States v. Pardue*, the First Circuit Court of Appeals determined that an officer had exceeded the scope of a *Terry* frisk when he discovered two boxes of ammunition in Pardue’s backpack. The officer then arrested Pardue for misdemeanor domestic violence. The court held that the ammunition inevitably would have been discovered during a standard inventory search of the backpack at police headquarters. The question arises whether courts should extend inevitable discovery to searches that have not yet been initiated based on police testimony that such a search definitely would have been undertaken (*United States v. Pardue*, 385 F.3d 101 [1st Cir. 2004]).

You Decide



10.2 Shawn Quinney was under investigation by special agents from the U.S. Secret Service for manufacturing and passing counterfeit currency. Two agents visited Quinney’s home and obtained his consent to look in his bedroom and saw a printer that could be used to create counterfeit bills. Quinney denied that he had been involved in manufacturing and distributing

bogus bills. Later that same day, two informants reported that Quinney had been involved in printing counterfeit bills. The agents returned to Quinney’s home and seized the printer without either consent or a search warrant. Quinney later confessed to Secret Service agents that he had been involved in counterfeiting currency. Was the printer admissible under the inevitable discovery doctrine? See *United States v. Quinney*, 583 F.3d 891 (6th Cir. 2009).

You can learn what the court decided by referring to the Student Study Site, edge.sagepub.com/lippmanpc3e.

Impeachment

Evidence that is seized in an unlawful search may be used for the **impeachment** of a defendant who takes the stand. Impeachment is defined as an opposing lawyer’s attack on a witness’s *credibility* during cross-examination. Credibility means whether a witness is to be believed. For example, if a defendant charged with the possession of illegal child pornography states that he or she has never possessed child pornography, this statement may be challenged on cross-examination by introducing at trial child pornography that was unlawfully seized from his or her house. The jury is instructed that they may consider such evidence that is *inconsistent* with the defendant’s testimony in evaluating the defendant’s credibility. The judge also instructs the jurors that they may not consider this evidence in evaluating whether the defendant is guilty of the possession of child pornography.

What is the reason for the impeachment exception to the exclusionary rule? The U.S. Supreme Court has reasoned that the jurors are entitled to hear all the information that may assist them in deciding the case and that a defendant should not be permitted to offer testimony that may be false (perjured) without being challenged.

The Supreme Court reasons that the police are deterred from unconstitutional conduct by the exclusion of unlawfully seized evidence from the prosecutor’s case-in-chief. The fact that illegally obtained evidence may be used for impeachment purposes does not significantly limit the deterrent value of the exclusionary rule. All witnesses whose statements or actions are inconsistent leave their credibility open to question during cross-examination, and the fact that the evidence has been obtained in an illegal fashion should not prohibit its use at trial when the defendant takes the stand and “opens the door” to cross-examination. Keep in mind that the defendant is not required to testify in his or her own defense and that if the defendant does not take the stand, the jury will not hear the evidence.

The leading case on the impeachment exception is *Walder v. United States*. Walder was charged with the sale of illegal narcotics. Two years earlier, he had been indicted for purchasing narcotics, but the indictment was dismissed after the narcotics had been suppressed as the fruit of an illegal search. Two witnesses testified at Walder’s trial that they had purchased narcotics from Walder. Walder took the stand and testified on direct questioning



that he had never sold, given, or transmitted narcotics to anyone. On cross-examination, Walder repeated that he had never “purchased, sold or sent” narcotics, and he denied that the government had ever seized narcotics from his home. A police officer then took the stand and testified that narcotics had been seized in an earlier unlawful search of Walder’s home (*Walder v. United States*, 347 U.S. 62 [1954]).

The U.S. Supreme Court, in affirming the use of unlawfully seized evidence for impeachment purposes, held that

it is one thing to say that the Government cannot make any affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence was obtained to his advantage and provide himself with a shield against the contradiction of his untruths.

The majority stressed that the defendant was free to deny the charges when he took the stand. In this case, however, the defendant offered a “sweeping claim” that he had never trafficked in or possessed narcotics (63–64).

In *Walder*, the defendant’s statement on *direct testimony* led to the prosecutor’s introduction of the fact that drugs were uncovered in the earlier search. In *United States v. Havens*, the Supreme Court held that a statement by a defendant on *cross-examination* was subject to impeachment. The Supreme Court rejected the court of appeals ruling that only a defendant’s statements on direct testimony were subject to impeachment by the fruits of an illegal search. The Court proclaimed that

it is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth. The defendant’s obligation to testify truthfully is fully binding . . . when . . . cross-examined. (*United States v. Havens*, 446 U.S. 620, 622–626 [1980])

Justices Brennan and Marshall, in dissent, were critical of the Supreme Court majority’s “disregard” of their obligation to enforce the Bill of Rights as a “bulwark of our national unity.” They asked whether the Court would be prepared to

acquiesce in torture . . . if it demonstrably advanced the fact finding process. . . . [T]he Constitution does not countenance police misbehavior, even in the pursuit of truth. The processes of our judicial system may not be fueled by the illegalities of government authorities. (633–634)

Defendants also may be impeached by confessions that were unlawfully obtained by the police in violation of *Miranda*:

Inconsistent statements. In *Harris v. New York*, the Supreme Court held that a defendant’s testimony denying that he had sold narcotics may be impeached on cross-examination by the prosecutor through the use of the defendant’s confession that had been suppressed by the judge. The Supreme Court explained that *Miranda* cannot be “perverted into a shield” that permits a defendant to “use perjury” without the “risk of confrontation with prior inconsistent utterances” (*Harris v. New York*, 401 U.S. 222, 226 [1971]). In 2009, the Supreme Court held in *Kansas v. Ventris* that confessions obtained by a jailhouse informant in violation of the Sixth Amendment also could be used to impeach a defendant’s testimony at trial (*Kansas v. Ventris*, 556 U.S. 586 [2009]).

Defense witnesses. In *James v. Illinois*, the Supreme Court refused to extend the impeachment exception to include the impeachment of defense witnesses by statements unlawfully obtained from the defendant. Why? The interest in “discouraging or disclosing perjured testimony” by defense witnesses is outweighed by the fact that the police would have an added incentive to disregard legal rules knowing that defense witnesses as well as the defendant himself or herself would be subject to impeachment. Defendants also would be reluctant to call defense witnesses knowing that the witnesses may be subject to impeachment, effectively limiting their ability to mount a defense. Defense witnesses, in turn, would be reluctant to testify, knowing that they may be impeached and possibly charged with perjury (*James v. Illinois*, 493 U.S. 307, 317, 319 [1990]).

In this chapter, we have seen that the exclusionary rule is based on the proposition that the rule deters police disregard of the Fourth Amendment. The exceptions to the exclusionary rule such as good faith are justified on the grounds that excluding the evidence would not greatly contribute to deterrence. The concluding section asks whether the empirical evidence supports the argument that the exclusionary rule deters the police. We also examine the contention that the exclusionary rule results in the guilty escaping punishment.



You can find *Walder v. United States and Harris v. New York* on the Student Study Site, edge.sagepub.com/lippman3e.



Legal Equation

Exceptions to the Exclusionary Rule

Collateral proceedings	⊃	Permit the use of unlawfully seized evidence in proceedings that are not part of the formal trial. This evidence also may be introduced in noncriminal proceedings.
Attenuation	⊃	Whether the evidence has been seized as a result of a Fourth Amendment violation or by means sufficiently distinguishable to be purged of the primary taint.
Good faith	⊃	Police acted in an honest and objectively reasonable belief in the legality of the search.
Independent discovery	⊃	Evidence that is unlawfully seized is admissible where the evidence also was obtained through independent and lawful means.
Inevitable discovery	⊃	Evidence that is seized as the result of an unconstitutional search is admissible where the government can prove by the preponderance of the evidence that this evidence would inevitably have been discovered in a lawful fashion.
Impeachment	⊃	Evidence that is seized in an unlawful search may be used on cross-examination to challenge the credibility of a defendant who takes the stand.
Impeachment and confessions	⊃	A defendant's testimony may be impeached on cross-examination through the use of an unlawful confession (a prior inconsistent statement).

DOES THE EXCLUSIONARY RULE DETER UNREASONABLE SEARCHES AND SEIZURES?

We have seen that the Supreme Court held in *Mapp v. Ohio* that the exclusionary rule is required under the Fourth Amendment to enforce the prohibition on unreasonable searches and seizures and to protect judicial integrity. A majority of the Supreme Court almost immediately retreated from this view and in a series of cases held that the exclusionary rule is a “judge-made” remedy that is not required by the Fourth Amendment. The Supreme Court has created a number of exceptions to the exclusionary rule. In most of these instances, the Court has determined that the application of the exclusionary rule is likely to have little deterrent impact and that the benefits of this modest amount of deterrence are outweighed by the costs of lost evidence and the possibility that a guilty defendant will walk out the courtroom door without a criminal conviction.

The Supreme Court no longer justifies the exclusionary rule on the grounds that the use of unlawfully seized evidence at trial undermines judicial integrity. After all, while it is true that the introduction of illegally seized evidence places judges in the position of endorsing a violation of the Constitution, there is the equally important concern that judges are assisting guilty defendants when they exclude reliable evidence from trial. Former Chief Justice Warren Burger, for instance, questioned whether the Supreme Court should continue to apply the exclusionary remedy when the result is “the release of countless guilty criminals” (*Bivens v. Six Unnamed Federal Agents*, 403 U.S. 388, 416 [1971]).

A number of social scientists have joined the debate over the exclusionary rule and have examined whether the exclusionary rule deters unconstitutional searches and seizures. Researchers concede that it is virtually impossible to answer the question of whether fewer illegal searches are carried out as a result of the exclusionary rule and have concluded that the data neither support nor refute the deterrent value of the exclusionary rule. Supreme Court Justice Harry Blackmun, after providing a detailed review of social science research in his opinion in *United States v. Janis*, concludes that “no empirical researcher, proponent or opponent of the [exclusionary] rule has yet



been able to establish with any assurance whether the rule has a deterrent effect.” The result according to Justice Blackmun is to call into question the argument that the exclusionary rule protects our Fourth Amendment rights (*United States v. Janis*, 428 U.S. 433, 450, n.22 [1976]).

We can only conclude that the benefits of the exclusionary rule in terms of deterring Fourth Amendment violations are uncertain. What of the costs? Does the exclusionary rule result in the exclusion of evidence that is required to convict defendants? Should we consider a less costly alternative? Thomas Davies, in an important essay, reviews a number of studies and concludes that the “nonprosecution and/or nonconviction” of cases by the police, prosecutors, and judges based on the illegal seizure of evidence is “in the range of 0.6% to 2.35%” of all felony arrests. Davies concludes that while these “loss rates” are not “trivial,” they do not amount to a “major impact” on the criminal justice system, “particularly in light of the fact that some of these charges likely would have been dropped or downgraded to misdemeanors or would not have resulted in prison sentences.” In Davies’s study of the California justice system, he finds that the highest percentage of cases lost due to the exclusionary rule involve drug charges (7.1 percent). In other areas, the exclusionary rule had almost no impact whatsoever (Davies, 1983).

Davies’s findings are reinforced by Peter Nardulli (1983). Nardulli conducted a three-county study of 7,500 cases in three states. Motions to suppress physical evidence were filed in roughly 5 percent of cases, most of which involved narcotics or weapons violations. These motions were successful in only 0.56 percent of all cases, meaning that forty cases (0.56 percent) were lost as a result of the exclusionary rule. Nardulli observes that only eight of the forty cases involved crimes of violence and that some of the cases may not have resulted in convictions at trial in any event. The highest percentage of “lost cases” were for narcotics offenses. Nine of the forty defendants would have received less than one month in jail; fifteen would have received less than two months. Only one defendant could have expected a sentence of more than one year. Nardulli concedes that his study may not be representative of every jurisdiction, but that based on his data, the exclusionary rule has a “truly marginal effect on the criminal court system.”

These data suggest that despite the heated debate and lengthy academic commentaries on the exclusionary rule, we are unable to draw a firm conclusion regarding the impact of the rule on the police. We also have seen that lawyers file motions to suppress physical evidence in a relatively small number of cases. In addition, few “criminals” escape punishment as a result of these motions to suppress physical evidence. This may indicate that the police may be adhering to legal standards or that defense lawyers simply do not believe that motions to suppress physical evidence will be successful in most instances. Critics may justifiably argue that even one “lost” case is too high a price to pay for the exclusionary rule. On the other hand, defenders of the exclusionary rule may credibly contend that the rule highlights the importance of police respect for the prohibition on unreasonable searches and seizures and that the rule serves to reinforce the commitment of the judicial branch to civil liberties (Nardulli, 1983).

The next part of the chapter discusses the affirmative defense of entrapment. Entrapment, like the exclusionary rule, provides defendants with legal protection against police practices. This defense protects defendants in those instances in which police tactics may induce otherwise innocent individuals to engage in criminal conduct.

ENTRAPMENT

American common law did not recognize the defense of **entrapment**. The fact that the government entrapped or induced a defendant to commit a crime was irrelevant in evaluating a defendant’s guilt or innocence.

The development of the defense is traced to the U.S. Supreme Court’s 1932 decision in *Sorrells v. United States*. In *Sorrells*, an undercover prohibition agent posing as a “thirsty tourist” struck up a friendship with Sorrells and was able to overcome Sorrells’s resistance and persuade him to locate some illegal alcohol. Sorrells’s conviction for illegally selling alcohol was reversed by the U.S. Supreme Court (*Sorrells v. United States*, 287 U.S. 435 [1932]).

The decision defined entrapment as the “conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.” The essence of entrapment is the government’s inducement of an otherwise innocent individual to commit a crime. Decisions have clarified that the prohibition on entrapment extends to the activities of undercover agents, confidential informants, and private citizens acting under the direction of law enforcement personnel. The defense has been raised in cases ranging from prostitution to the illegal sale of alcohol, cigarettes, firearms, and narcotics and to public corruption. There is some indication that the defense may not be relied on to excuse a crime of severe violence.



There are good reasons for the government to rely on undercover strategies:

- Certain crimes are difficult to investigate and to prevent without using informants. These include prostitution, public corruption, and crimes related to the illegal sale of narcotics.
- Undercover techniques, such as posing as a buyer of stolen goods, can result in a large number of arrests without the expenditure of substantial resources.
- Individuals will be deterred from criminal activity by the threat of government involvement in the crime.

Entrapment also is subject to criticism:

- The government may “manufacture crime” by individuals who otherwise may not engage in criminal activity.
- The government may lose respect by engaging in lawbreaking.
- The informants who are employed by the government to infiltrate criminal organizations may be criminals whose own illicit activity often is overlooked in exchange for their assistance.
- Innocent individuals are approached in order to test their moral virtue by determining whether they will engage in criminal activity.

The Law of Entrapment

In developing a legal test to regulate entrapment, judges and legislators have attempted to balance the need of law enforcement to rely on undercover techniques against the interest in ensuring that innocent individuals are not pressured or tricked into illegal activity. As noted by U.S. Supreme Court Chief Justice Earl Warren in 1958, “A line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal” (*Sherman v. United States*, 356 U.S. 369, 372 [1958]).

Two competing legal tests for entrapment were nicely articulated by the U.S. Supreme Court in *Sherman v. United States* in 1958. Sherman’s conviction on three counts of selling illegal narcotics was overturned by the Supreme Court, and the facts, in many respects, illustrate the perils of government undercover tactics. Kalchinian, a government informant facing criminal charges, struck up a friendship with defendant Sherman. They met and regularly talked during their visits to a doctor who was assisting both of them to end their dependence on drugs. Kalchinian was able to overcome Sherman’s resistance and persuade him to obtain and to split the cost of illegal narcotics.

Members of the Supreme Court unanimously agreed that Sherman had been entrapped. Five judges supported a subjective approach to entrapment and four an objective test. The federal government and a majority of states follow a subjective test, while the Model Penal Code and a minority of states rely on the objective approach. Keep in mind that the legal concept of entrapment was developed by judges, and the availability of this defense has not been recognized as part of a defendant’s constitutional right to due process of law. Entrapment in many states is an affirmative defense that places the burden on the defendant to meet a preponderance of the evidence standard. Other states require the defendant to produce some evidence and then place the burden on the government to prove the absence of entrapment (LaFave, Israel, & King, 2000).

The Subjective Test

The **subjective test for entrapment** focuses on the defendant and asks whether the accused possessed the criminal intent or “predisposition” to commit the crime or whether the government “created” the crime. In other words, “but for” the actions of the government, would the accused have broken the law? Was the crime the “product of the creative activity of the government” or a result of the defendant’s own criminal design?

The first step is to determine whether the government induced the crime. This requires that the undercover agent or informant persuade or pressure the accused. A simple offer to sell or to purchase drugs is a “mere offer” and does not constitute an “inducement.” Rather, inducement requires appeals to friendship, compassion, promises of extraordinary economic or material gain or sexual favors, or assistance in carrying out the crime.

The second step is the most important and involves evaluating whether the defendant possessed a “predisposition” or readiness to commit the crime with which he or she is charged. The law assumes that a defendant who is predisposed is ready and willing to engage in criminal conduct in the absence of inducements and for this reason is not entitled to rely on the defense of entrapment. In other words, the government must direct its undercover strategy against the unwary criminal rather than the unwary innocent.



How is predisposition established? A number of factors are considered (*United States v. Fusko*, 869 F.2d 1048 [7th Cir. 1989]).

- The character or reputation of the defendant, including prior criminal arrests and convictions for the type of crime involved
- Whether the government or the accused suggested the criminal activity
- Whether the defendant was engaged in criminal activity for profit
- Whether the defendant was reluctant to commit the offense
- The attractiveness of the inducement

In *Sherman*, the purchase of the drugs was initiated by the informant, Kalchinian, who overcame Sherman's initial resistance and persuaded him to obtain drugs. Kalchinian, in fact, had instigated two previous arrests and himself was facing sentencing for a drug offense. The two split the costs. There is no indication that Sherman was otherwise involved in the drug trade, and a search failed to find drugs in his home. Sherman's nine-year-old sales conviction and five-year-old possession conviction did not indicate that he was ready and willing to sell narcotics. In other words, before Kalchinian induced Sherman to purchase drugs, he seemed to be genuinely motivated to overcome his addiction.

The underlying theory is that the judge is carrying out the intent of the legislature and that these elected representatives did not intend that the law would be used to punish otherwise innocent individuals who were induced to commit crimes by government trickery and pressure. The issue of entrapment under the subjective test is to be decided by the jury in determining the guilt or innocence of the accused (*Sherman v. United States*, 356 U.S. 369 [1958]).

The Objective Test

The **objective test for entrapment** focuses on the conduct of the government rather than on the character of the individual. Justice Felix Frankfurter in his dissenting opinion in *Sherman* stated that the crucial question is "whether police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of governmental power." The police, of course, must rely on undercover work, and the test for entrapment is whether in offering inducements the government is likely to attract those "ready and willing" to commit crimes "should the occasion arise" or is relying on tactics and strategies that are likely to attract those who "normally avoid crime and through self-struggle resist ordinary temptations." Under the subjective approach, if an informant makes persistent appeals to compassion and friendship and then asks a defendant to sell narcotics, the defendant has no defense if he is predisposed to selling narcotics. Under the objective approach, there would be a defense, because the police conduct rather than the defendant's predisposition is the central consideration (LaFave et al., 2000, p. 458).

Frankfurter wrote that public confidence in the integrity and fairness of the government must be preserved and that government power is "abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law." These unacceptable methods lead to a lack of respect for the law and encourage criminality. Frankfurter argued that judges accordingly must condemn corrupt and uncivilized methods of law enforcement even where this results in the acquittal of the accused. Frankfurter criticized the predisposition test for providing protection for "innocent defendants" while permitting the government to subject defendants who are predisposed to commit crimes to all varieties of unethical strategies and schemes.

In *Sherman*, Frankfurter condemned Kalchinian's repeated requests to the accused to obtain drugs. He pointed out that Kalchinian took advantage of the fact that Sherman was struggling to overcome his addiction and that Sherman possessed a natural sympathy for the pain suffered by Kalchinian in withdrawing from narcotics. *Sherman* and *Sorrells* suggest that practices prohibited under the objective test include the following:

- Taking advantage of weaknesses
- Repeated appeals to friendship, sympathy
- Promising substantial economic gain
- Pressure or threats
- Providing the equipment required for carrying out a crime
- False representations designed to induce a belief that solicited criminal conduct is not prohibited by law

Critics nevertheless complain that the objective test has not resulted in clear and definite standards to guide law enforcement. Can you determine at what point Kalchinian crossed the line? Critics also charge that



it makes little sense to acquit defendants who are “predisposed” based on the fact that an “innocent” individual may have been tricked into criminal activity by the government. The determination of entrapment under the objective test is a question for the judge rather than the jury. Justice Frankfurter reasoned that the judge is the guardian of the integrity of the courtroom and is responsible for ensuring that the police have not employed impermissible investigative techniques. The judge also is in a position to articulate general principles to guide the police in the future.

The Due Process Test

The **due process test for entrapment** is a constitutionally based entrapment defense. A defendant may rely on the entrapment defense in those instances in which the government’s conduct was so unfair and outrageous that it violates the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, and it therefore would be unjust to convict the defendant. This theory proves particularly useful to defendants in jurisdictions that follow the subjective test who possess a predisposition and are otherwise precluded from invoking the entrapment defense.

The U.S. Supreme Court rejected due process tests in *United States v. Russell*. In the situation at issue in this case, Joe Shapiro, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, met with Richard Russell and his codefendants, John and Patrick Connolly. Shapiro offered to provide them with the chemical phenyl-2-propanone, an essential element in the manufacture of methamphetamine, in return for one-half of the drug produced. The three provided Shapiro with a sample of their most recent batch and showed him their laboratory, where Shapiro observed an empty bottle of phenyl-2-propanone. The next day, Shapiro delivered one hundred grams of propanone and observed two of the defendants begin to manufacture methamphetamine. Shapiro later was given one-half of the drug produced, and he purchased a portion of the remainder. A warrant was obtained, and a search revealed two bottles of propanone, neither of which had been provided by Shapiro (*United States v. Russell*, 411 U.S. 423 [1973]).

The defendants certainly were predisposed to manufacture and sell narcotics, but creatively claimed that the government violated due process by prosecuting them for a crime in which the government had been intimately involved. The U.S. Supreme Court, in rejecting this argument, stressed that while propanone was “difficult to obtain, it was by no means impossible” as indicated by the fact that the defendants had been manufacturing “speed” without the propanone provided by Shapiro. The Court concluded that

while we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction . . . the instant case is distinctly not of that breed.

The Supreme Court stressed that the investigation of drug-related offenses often requires infiltration into and cooperation with narcotics rings and that the law enforcement tactics employed in *Russell* “can hardly be said to violate fundamental fairness” or to be “shocking to the universal sense of justice.”

Invoking the Entrapment Defense

Entrapment is an *affirmative defense*, meaning that it must be raised by the defendant. In jurisdictions following the subjective approach, the defendant generally is required to establish the fact of inducement by a government agent. The burden then shifts to the government to counter the defense by establishing the defendant’s “predisposition” beyond a reasonable doubt. In contrast, jurisdictions that have adopted the objective test generally place both the burden of production of evidence and persuasion on the defendant. The defendant under the objective test must convince the jury that he or she was entrapped by a predominance of the evidence, which is a balance of probabilities, or slightly over 50 percent.

Can you both deny that you committed a criminal offense and claim that you were entrapped? In *Mathews v. United States*, the U.S. Supreme Court held that a defendant was entitled to deny committing a criminal offense while also relying on the “inconsistent defense” of entrapment. In *Mathews*, the Court upheld the defendant’s right both to deny that he had intended as a federal official to engage in bribery and to contend that he had been entrapped (*Mathews v. United States*, 485 U.S. 58 [1988]).

We might question whether courts should be involved in evaluating law enforcement tactics and in acquitting individuals who are otherwise clearly guilty of criminal conduct. Can innocent individuals really be pressured into criminal activity? Do we want to limit the ability of the police to use the techniques they believe are required to investigate and punish crime? There also appear to be no clear judicial standards for determining



predisposition under the subjective test and for evaluating acceptable law enforcement tactics under the objective approach. On the other hand, there clearly should be a mechanism for limiting abusive investigative practices by the police.

The next case in the text is *Jacobson v. United States*. *Jacobson* is a leading Supreme Court case that raises the question of whether Jacobson was predisposed to purchase child pornography or whether his predisposition was the product of the creative activity of the government. *Jacobson* also raises the issue of whether predisposition should be measured at the time that the government first approached Jacobson or at the time that the government offered to sell Jacobson illegal child pornography. You will find two cases on the Student Study Site that raise the question of identifying the circumstances under which the requirements of the due process test are satisfied: *Hampton v. United States*, 425 U.S. 484, decided by the U.S. Supreme Court in 1976, and the 2006 Florida decision in *Madera v. State*, 943 So. 2d 960 (Fla. 4th Dist. Ct. App.).



You will find *Hampton v. United States* and *Madera v. State* on the Student Study Site, edge.sagepub.com/lippman3e.

Legal Equation

Subjective test (adopted by a majority of states)	=	Government inducement
	+	Defendant is not predisposed to commit the crime.
Objective test (adopted by a minority of states)	=	Police conduct falls below standards to which common feelings respond (induces crime by individuals who normally avoid crime).

CRIMINAL PROCEDURE IN THE NEWS

In 1978, the FBI established an undercover organization titled Abdul Enterprises. The organization allegedly represented two wealthy “Arabs” interesting in investing in the United States. The FBI enlisted the assistance of a convicted felon, Melvin Weinberg, who posed as head of Abdul Enterprises. The firm used various “middle men” to contact members of Congress, to whom they offered \$25,000 to introduce immigration legislation permitting the entry of various foreign nationals into the United States. The scheme resulted in the conviction of several members of Congress for bribery. Critics asked whether the government should be testing the morals of individuals and whether the government was manufacturing crime. On the other hand, the American public has an interest in uncovering crooked politicians and in deterring the corruption of the political process.

In the last few years a “reverse sting” tactic employed by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives has resulted in the conviction and lengthy criminal punishment of over one thousand individuals. A government informant wearing a “wire” poses as an unhappy drug courier or drug house security guard and approaches individuals with criminal records of drug activity. The informant reports that there is a lightly guarded stash house that contains a significant amount of drugs and money. The conspirators are immediately arrested when they meet to carry out the robbery. These stings are criticized because in the addi-

tion of the arrest of dangerous drug offenders they have resulted in the conviction of low-level drug offenders, all of whom are charged with conspiracy to possess a significant quantity of narcotics. An estimated 80 percent of individuals convicted already had two felony convictions although in some instances these convictions did not involve crimes of violence. Only roughly 5 percent of defendants charged with involvement in these “fictional” drug-house raids have been acquitted at trial. Judge Richard Posner in several opinions has criticized drug-house stings as a “disreputable tactic” that creates “an increased risk of entrapment because of the . . . extensive use of inducements and unrealistic temptations to encourage the suspects’ criminal conduct.” See *United States v. Kindle*, 698 F.3d 401 (7th Cir. 2011).

Another controversial method of entrapment is the use of “decoy operations” that increasingly are employed to arrest individuals for less serious criminal offenses. In Las Vegas, the police have used undercover officers to pose as “intoxicated vagrants.” The “vagrants” have money visibly sticking out of their pockets. The moment individuals approach and attempt to take the money, they are arrested.

In Los Angeles, the police use “bait cars.” They leave expensive automobiles on the street with the door open, keys in the ignition, and laptop on the front seat. The police wait to arrest individuals who enter and attempt to drive off in the auto. In 2011, “bait



cars” resulted in the arrest of more than 112 people, 75 percent of whom had prior criminal convictions. In other jurisdictions, the police leave bikes on the street and use electronic monitors embedded in the bikes to track and to arrest bicycle thieves.

The New York Police Department (NYPD) uses “operation lucky bag,” in which officers leave wallets and bags full of electronic devices in public locations and arrest individuals who walk away with these items without contacting nearby uniformed police officers. The NYPD also leaves the emergency exit gate open at the entrance to subways and arrests individuals who grow impatient with the line of people waiting to enter the subway and who unlawfully enter through the open gate.

The pedestrian decoy operation in various cities involves plainclothes police officers crossing the street at marked crosswalks and arresting drivers who fail to yield. Other decoy techniques involve leaving bikes that are not secured by locks on the street.

A number of jurisdictions also use “shoulder tap” decoy operations in which juveniles working for the police approach adults and offer them money to unlawfully purchase alcohol for the juvenile.

In rural areas, the police have used “robotic deer” to catch individuals hunting out of season.

Perhaps the most controversial decoy operation occurred in Columbus, Ohio. The police initiated an operation to combat lewd sexual activity in city parks. An off-duty, forty-year-old firefighter stated that he spotted a woman sunbathing topless in the park. He approached her, and they began talking. The woman became increasingly friendly and rested her foot on his shoulder. She asked the defendant to unzip and to expose himself. As the firefighter began to disrobe, police officers pulled up in a van and arrested him for public indecency. The operation resulted in numerous arrests including the arrest of a doctor, a government employee, and a retired police officer.

Consider whether the government should test the morality of individuals and whether the police are creating crime and expending resources on offenses that do not pose a serious threat. On the other hand, these decoy operations have resulted in numerous arrests and reinforce the rule of law by sending the message that breaking the law may lead to arrest. Does tempting individuals to violate the law constitute entrapment under the predisposition test? Under the objective test? Should the government be required to establish that the “decoy operations” was necessary to combat crime in the community?

Was Jacobson predisposed to order child pornography through the mail?

Jacobson v. United States, 503 U.S. 540 (1992), *White, J.*

Issue

On September 24, 1987, petitioner Keith Jacobson was indicted for violating a provision of the Child Protection Act of 1984, which criminalizes the knowing receipt through the mails of a “visual depiction [that] involves the use of a minor engaging in sexually explicit conduct. . . .” Petitioner defended on the ground that the Government entrapped him into committing the crime through a series of communications from undercover agents that spanned the twenty-six months preceding his arrest. Petitioner was found guilty after a jury trial. The court of appeals affirmed his conviction, holding that the Government had carried its burden of proving beyond reasonable doubt that petitioner was predisposed to break the law and hence was not entrapped. The central issue is whether . . . the Government overstepped the line between setting a trap for the “unwary innocent” and the “unwary criminal” and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested. . . .

Facts

In February 1984, petitioner, a fifty-six-year-old veteran-turned-farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. The magazines, titled *Bare Boys I* and *Bare Boys II*, contained photographs of nude preteen and teenage boys. The contents of the magazines startled petitioner, who testified that he had expected to receive photographs of “young men eighteen years or older.”

The young men depicted in the magazines were not engaged in sexual activity, and petitioner’s receipt of the magazines was legal [at the time he received them] under both federal and Nebraska law. Within three months, the law with respect to child pornography changed; Congress passed the act illegalizing the receipt through the mails of sexually explicit depictions of children. In the very month that the new provision became law, postal inspectors found petitioner’s name on the mailing list of the California bookstore that had mailed him *Bare Boys I* and *II*. There followed over the



next two and one-half years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail.

The Government began its efforts in January 1985 when a postal inspector sent petitioner a letter supposedly from the American Hedonist Society, which in fact was a fictitious organization. The letter included a membership application and stated the society's doctrine: that members had the "right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality." Petitioner enrolled in the organization and returned a sexual attitude questionnaire that asked him to rank on a scale of one to four his enjoyment of various sexual materials, with one being "really enjoy," two being "enjoy," three being "somewhat enjoy," and four being "do not enjoy." Petitioner ranked the entry "pre-teen sex" as a two, but indicated that he was opposed to pedophilia.

For a time, the Government left petitioner alone. But then a new "prohibited mailing specialist" in the postal service found petitioner's name in a file, and in May 1986, petitioner received a solicitation from a second fictitious consumer research company, Midlands Data Research, seeking a response from those who "believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophyte [*sic*] age." The letter never explained whether "neophyte" referred to minors or to young adults. Petitioner responded: "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential."

Petitioner then heard from yet another Government creation, Heartland Institute for a New Tomorrow (HINT), which proclaimed that it was "an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process." The letter also enclosed a second survey. Petitioner indicated that his interest in "preteen sex-homosexual" material was above average, but not high. In response to another question, petitioner wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms."

HINT replied, portraying itself as a lobbying organization seeking to repeal "all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape. HINT is also lobbying to eliminate any legal definition of 'the age of consent.'" These lobbying efforts were to be funded by sales from a catalog to be published in the future "offering the

sale of various items which we believe you will find to be both interesting and stimulating." HINT also provided computer matching of group members with similar survey responses, and, although petitioner was supplied with a list of potential "pen pals," he did not initiate any correspondence.

Nevertheless, the Government's "prohibited mailing specialist" began writing to petitioner, using the pseudonym "Carl Long." The letters employed a tactic known as "mirroring," which the inspector described as "reflecting whatever the interests are of the person we are writing to." Petitioner responded at first, indicating that his interest was primarily in "male-male items." Inspector "Long" wrote back,

My interests too are primarily male-male items. Are you satisfied with the type of VCR tapes available? Personally, I like the amateur stuff better if its [*sic*] well produced as it can get more kinky and also seems more real. I think the actors enjoy it more.

Petitioner responded, "As far as my likes are concerned, I like good looking young guys (in their late teens and early twenties) doing their thing together." Petitioner's letters to "Long" made no reference to child pornography. After writing two letters, petitioner discontinued the correspondence.

By March 1987, thirty-four months had passed since the Government had obtained petitioner's name from the mailing list of the California bookstore, and twenty-six months had passed since the postal service had commenced its mailings to petitioner. Although petitioner had responded to surveys and letters, the Government had no evidence that petitioner had ever intentionally possessed or been exposed to child pornography. The postal service had not checked petitioner's mail to determine whether he was receiving questionable mailings from persons—other than the Government—involved in the child pornography industry.

At this point, a second Government agency, the customs service, included petitioner in its own child pornography sting, Operation Borderline, after finding his name on lists submitted by the postal service. Using the name of a fictitious Canadian company called Produit Outaouais, the customs service mailed petitioner a brochure advertising photographs of young boys engaging in sex. Petitioner placed an order that was never filled.

The postal service also continued its efforts in the Jacobson case, writing to petitioner as the [fictitious company] Far Eastern Trading Company Ltd. The letter began,

As many of you know, much hysterical nonsense has appeared in the American media concerning "pornography" and what must



be done to stop it from coming across your borders. This brief letter does not allow us to give much comments; however, why is your government spending millions of dollars to exercise international censorship while tons of drugs, which makes yours the world's most crime ridden country[,] are passed through easily[?]

The letter went on to say:

We have devised a method of getting these to you without prying eyes of U. S. Customs. . . . After consultations with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without authorization of a judge.

The letter invited petitioner to send for more information. It also asked petitioner to sign an affirmation that he was “not a law enforcement officer or agent of the U.S. Government acting in an undercover capacity for the purpose of entrapping Far Eastern Trading Company, its agents or customers.” Petitioner responded. A catalog was sent, and petitioner ordered *Boys Who Love Boys*, a pornographic magazine depicting young boys engaged in various sexual activities. Petitioner was arrested after a controlled delivery of a photocopy of the magazine.

When petitioner was asked at trial why he placed such an order, he explained that the Government had succeeded in piquing his curiosity:

Well, the statement was made of all the trouble and the hysteria over pornography and I wanted to see what the material was. It didn't describe the—I didn't know for sure what kind of sexual action they were referring to in the Canadian letter.

In petitioner's home, the Government found the *Bare Boys* magazines and materials that the Government had sent to him in the course of its protracted investigation, but no other materials that would indicate that petitioner collected, or was actively interested in, child pornography.

Reasoning

There can be no dispute about the evils of child pornography or the difficulties that laws and law enforcement have encountered in eliminating it. . . . Likewise, there can be no dispute that the Government may use undercover agents to enforce the law:

It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.

In their zeal to enforce the law, however, Government agents may not originate a criminal design; that is, they may not implant in an innocent person's mind the disposition to commit a criminal act and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

Inducement is not at issue in this case. The Government does not dispute that it induced petitioner to commit the crime. The sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law before the Government intervened. By the time petitioner finally placed his order, he had already been the target of twenty-six months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985.

The prosecution's evidence of predisposition falls into two categories: evidence developed prior to the postal service's mail campaign, and that developed during the course of the investigation. The sole piece of preinvestigation evidence is petitioner's 1984 order and receipt of the *Bare Boys* magazines. But this is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which a defendant is presumed to know. It may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes, but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.

Furthermore, petitioner was acting within the law at the time he received these magazines. Receipt through the mails of sexually explicit depictions of children for noncommercial use did not become illegal under federal law until May 1984, and Nebraska had no law that forbade petitioner's possession of such material until 1988. Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show



predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence. Hence, the fact that petitioner legally ordered and received the *Bare Boys* magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act. This is particularly true given petitioner's unchallenged testimony that he did not know until they arrived that the magazines would depict minors.

The prosecution's evidence gathered during the investigation also fails to carry the Government's burden. Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails. Furthermore, a person's inclinations and "fantasies . . . are his own and beyond the reach of government. . . ."

On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights. For instance, HINT described itself as "an organization founded to protect and promote sexual freedom and freedom of choice" and stated that "the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators." These lobbying efforts were to be financed through catalog sales. Mailings from the equally fictitious American Hedonist Society and the correspondence from the nonexistent Carl Long continue these themes.

Similarly, the two solicitations in the spring of 1987 raised the specter of censorship while suggesting that petitioner ought to be allowed to do what he had been solicited to do. The mailing from the customs service referred to "the worldwide ban and intense enforcement on this type of material," observed that "what was legal and commonplace is now an 'underground' and secretive service," and emphasized that "this environment forces us to take extreme measures" to ensure delivery. The postal

service solicitation described the concern about child pornography as "hysterical nonsense," decried "international censorship," and assured petitioner, based on consultation with "American solicitors," that an order that had been posted could not be opened for inspection without authorization of a judge. It further asked petitioner to affirm that he was not a Government agent attempting to entrap the mail order company or its customers. In these particulars, both Government solicitations suggested that receiving this material was something that petitioner ought to be allowed to do.

Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. The evidence that petitioner was ready and willing to commit the offense came only after the Government had devoted two and one-half years to convincing him that he had or should have the right to engage in the very behavior proscribed by law. Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner. Where entrapment was found as a matter of law, "the Government [may not] play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted."

Law enforcement officials go too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Like the *Sorrells* Court, we are

unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.

Holding

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce



evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the court of appeals judgment affirming the conviction of Keith Jacobson.

Dissenting, O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., and joined in part by Scalia, J.

Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies or friendship or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face to face. The Government contends that from the enthusiasm with which Mr. Jacobson responded to the chance to commit a crime, a reasonable jury could permissibly infer beyond a reasonable doubt that he was predisposed to commit the crime. I agree. The first time the Government sent Mr. Jacobson a catalog of illegal materials, he ordered a set of photographs advertised as picturing "young boys in sex action fun." He enclosed the following note with his order: "I received your brochure and decided to place an order. If I like your product, I will order more later." For reasons undisclosed in the record, Mr. Jacobson's order was never delivered.

The second time the Government sent a catalog of illegal materials, Mr. Jacobson ordered a magazine called *Boys Who Love Boys*, described as: "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Along with his order, Mr. Jacobson sent the following note: "Will order other items later. I want to be discreet in order to protect you and me."

Government agents admittedly did not offer Mr. Jacobson the chance to buy child pornography right away. Instead, they first sent questionnaires in order to make sure that he was generally interested in the subject matter. Indeed, a "cold call" in such a business would not only risk rebuff and suspicion, but might also shock and offend the uninitiated, or expose minors to suggestive materials. Mr. Jacobson's responses to the questionnaires gave the investigators reason to think he would be interested in photographs depicting preteen sex.

The Court, however, concludes that a reasonable jury could not have found Mr. Jacobson to be

predisposed beyond a reasonable doubt on the basis of his responses to the Government's catalogs, even though it admits that, by that time, he was predisposed to commit the crime. The Government, the Court holds, failed to provide evidence that Mr. Jacobson's obvious predisposition at the time of the crime "was independent and not the product of the attention that the Government had directed at petitioner." In so holding, I believe the Court fails to acknowledge the reasonableness of the jury's inference from the evidence, redefines "predisposition," and introduces a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect. . . .

After this case, every defendant will claim that something the Government agent did before soliciting the crime "created" a predisposition that was not there before. For example, a bribe taker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug's purity and effects was so tempting that it created the urge to try it for the first time. In short, the Court's opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects. That limitation would be especially likely to hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography. No doubt the Court would protest that its opinion does not stand for so broad a proposition, but the apparent lack of a principled basis for distinguishing these scenarios exposes a flaw in the more limited rule the Court today adopts. . . . The Government conduct in this case is not comparable. While the Court states that the Government "exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights," one looks at the record in vain for evidence of such "substantial pressure."

. . . The second puzzling thing about the Court's opinion is its redefinition of predisposition. The Court acknowledges that "petitioner's responses to the many communications prior to the ultimate criminal act were . . . indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex. . . ." If true, this should have settled the matter; Mr. Jacobson was predisposed to engage in the illegal conduct. Yet, the Court concludes, "Petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails."

. . . Because I believe there was sufficient evidence to uphold the jury's verdict, I respectfully dissent.



Questions for Discussion

1. What is the issue in *Jacobson*? Why is this an important question for the Supreme Court to decide?
2. Summarize the majority and dissenting decisions. Which opinion do you find more persuasive?
3. Do you believe that the government should have devoted time and resources to pursuing and prosecuting *Jacobson*?
4. This was a 5–4 decision. Do you believe that the Supreme Court's judgment in *Jacobson* interferes with law enforcement's ability to investigate crimes?

CHAPTER SUMMARY

In 1914, in *Weeks v. United States*, the U.S. Supreme Court ruled that evidence seized in violation of the Fourth Amendment is to be excluded from evidence in federal prosecutions. Thirty-five years later, in *Wolf v. Colorado*, the Court held that the requirements of the Fourth Amendment are incorporated into the Fourteenth Amendment and are applicable to proceedings in state and local courts. In 1961, in *Mapp v. Ohio*, the Supreme Court held that the Fourth Amendment exclusionary rule also applied to prosecutions in state courts. The Court explained that the exclusionary rule is “part and parcel” of the Fourth Amendment, provides a deterrent to police disregard for the Fourth Amendment, and protects the integrity of the judicial process by excluding tainted evidence from trial. These twin goals, according to the majority of the justices on the Court at that time, could not be accomplished through civil remedies, criminal prosecution, or disciplinary proceedings. Subsequently, in a series of judgments, the Court shifted its position and ruled that the exclusionary rule is a “judge-made” remedy that is not required by the Fourth Amendment, whose sole purpose is to deter unreasonable searches and seizures.

The typical avenue for challenging the reasonableness of a search and seizure is the filing of a pretrial motion to suppress. Most states and the federal courts place the burden of proof on the defendant when the search or seizure is based on a warrant. The burden is reversed and is placed on the government when the police act without a warrant. The legal test to be applied for standing to file a motion to suppress an alleged violation of the Fourth Amendment prohibition on unreasonable searches and seizures is whether an individual has a subjective and reasonable expectation of privacy in the area that was searched. The burden of proof for demonstrating standing customarily is placed on the defendant.

The Supreme Court has created a number of exceptions to the exclusionary rule in those instances in which the Court has concluded that the limited deterrent value of excluding the evidence is outweighed by the costs of excluding the evidence from the trial. In

other words, in these cases the Court found that there was “too much pain for too little gain.” These exceptions are as follows:

- **Collateral proceedings.** The evidence is admissible in criminal proceedings that are not part of the formal trial as well as in certain civil proceedings.
- **Attenuation.** There is a weak connection between the unlawful search and the seizure of the evidence.
- **Good faith.** The police acted in an objectively reasonable fashion in seizing the evidence.
- **Independent source.** The evidence was also discovered through lawful means that are separate and distinct from the unlawful seizure of the evidence.
- **Inevitable discovery.** The evidence eventually would have been lawfully discovered.
- **Impeachment.** Unlawfully seized items may be introduced on cross-examination to attack the defendant's credibility.

Entrapment provides an affirmative defense when the government has relied on tactics and strategies that are likely to induce an otherwise innocent individual to commit a crime. The development of the defense is traced to the U.S. Supreme Court's 1932 decision in *Sorrells v. United States*. The decision defines entrapment as the “conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.” The subjective and objective tests are the two major competing approaches to entrapment. Defendants also have argued that unfair and outrageous police strategies violate the Due Process Clause of the U.S. Constitution.

The subjective test for entrapment *focuses on the defendant* and asks whether the accused possessed the criminal intent or “predisposition” to commit the crime or whether the government “created” the crime.



The objective test for entrapment focuses on the conduct of the government rather than on the character of the individual.

The due process test for entrapment permits a defendant to rely on the entrapment defense in those instances in which the government's conduct is so

unfair and outrageous that it violates the Due Process Clause of the Fifth and Fourteenth Amendments and therefore it would be unfair to convict the defendant.

The next chapter discusses other remedies that are available to defendants whose constitutional rights have been violated.

CHAPTER REVIEW QUESTIONS

- Trace the development of the exclusionary rule from *Weeks* to *Mapp* and *Calandra*.
- Outline the arguments for and against the exclusionary rule. What alternative procedural mechanisms to the exclusionary rule have been proposed? Will these procedures deter police violations of the Fourth Amendment?
- Outline the steps involved in filing a motion to suppress evidence.
- Who has standing to file a motion to suppress?
- List and discuss the exceptions to the exclusionary rule.
- Why did the judiciary develop a good faith exception to the exclusionary rule?
- What do the empirical data indicate in regard to whether the exclusionary rule deters the police from engaging in unreasonable searches and seizures? What about the data concerning the costs of the exclusionary rule?
- Does the interest in judicial integrity justify the application of the exclusionary rule?
- Define entrapment. What is the purpose of the entrapment defense?
- Describe the objective, subjective, and due process tests for entrapment.
- Outline the arguments for and against the entrapment defense.
- Should there be an entrapment defense?

LEGAL TERMINOLOGY

attenuated	fruit of the poisonous tree	objective test for entrapment
collateral proceedings	good faith exception	purging the taint
derivative evidence	harmless error	silver platter doctrine
due process test for entrapment	impeachment	standing
entrapment	independent source doctrine	subjective test for entrapment
exclusionary rule	inevitable discovery rule	



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- Read about *Mapp v. Ohio*, and listen to the oral arguments before the Supreme Court.
- Read a defense of the exclusionary rule by the Cato Institute, a conservative, libertarian organization, and watch a video on the exclusionary rule.
- Watch a video tutorial on entrapment.
- Look at a video on entrapment and the use of "bait cars."