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The American Exclusionary Rule Experience

Gerald S. Reamey
St. Mary's University School of Law, greamey@stmarytx.edu

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There are many exclusionary rules in the American criminal justice system,[1] as there are in virtually all legal systems. The one "exclusionary rule" that is best known and has proven to be most controversial, however, is the rule that prohibits the admission of evidence that was obtained as a result of some unlawful search or seizure by the police.[2] This rule gives effect to the Fourth Amendment of the United States Constitution,[3] the guarantee that citizens will be free from "unreasonable" searches and seizures by the government.[4]

Other rules, also properly called "exclusionary rules", prevent the admission at trial of evidence that is unreliable or irrelevant.[5] In fact, largely because of the American jury system, an entire body of law exists regarding the rules of evidence. Lengthy codes are devoted to this subject,[6] and thousands of opinions from appellate courts annually decide legal issues arising under the rules of evidence. Many of these rules, especially the ones designed to exclude unreliable evidence, are intended to keep laypersons on the jury from hearing, and being influenced by, potentially untruthful or inaccurate evidence.

The rule excluding evidence obtained illegally by the police is different, however, and that difference is a source of the controversy surrounding it. While exclusion-

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1 See *George E. Dix,* Nonconstitutional Exclusionary Rules in Criminal Procedure, 27 Am.Crim.L.Rev.53 (1989).

2 See Weeks v. U.S., 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

3 The Fourth Amendment states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

4 The Fourth Amendment, like other provisions of the U.S. Constitution, applies to governmental or "state" action. Unreasonable searches or seizures by private persons are not within the reach of the Amendment. See *Wayne R. Lafave/Jerold H. Israel,* Criminal Procedure § 3.1(h) (2d ed. 1992); U.S. v. Jacobsen, 466 U.S. 109 (1984) (private party search was not a "search" for Fourth Amendment purposes).

5 Evidentiary rules prevent the admission of testimony that is "hearsay", or the use of copies of documents when originals are available. As is true in most legal systems, a broad prohibition on irrelevant evidence exists.

6 See, e.g., Federal Rules of Evidence, 28 U.S.C.A. Rules Appendix.

ary rules prohibiting the introduction of unreliable or irrelevant evidence obviously advance the truth-finding function of a court, the Fourth Amendment exclusionary rule does just the opposite. It excludes evidence that often is highly trustworthy and directly relevant to the guilt of the accused person.[7] The effect of the rule is to hide from the court (judge or jury) that which may be essential to determining the truth of the criminal accusation. And when this happens, when a judge orders evidence suppressed because of police misconduct, everyone knows of the existence and value of the suppressed evidence.[8] As a result of the exclusion, it often is impossible for the state to continue with its prosecution because the unavailability of that evidence makes it impossible for the state to prove all elements of the crime beyond a reasonable doubt.

It has been said that when the exclusionary rule is applied, everyone sees the "price" that American society pays for enforcement of its constitutional protection.[9] If a police officer unconstitutionally forces open a car and discovers a dead body inside, evidence associated with the body is inadmissible. The murderer goes free because "the constable has blundered".[10]

Such a result leads observers to ask why Americans have such a rule.[11] Nowhere does the United States Constitution specify that an exclusionary rule be used to enforce the Fourth Amendment.[12] Nor does our legal history support such a rule.[13] A majority of justices on the U.S. Supreme Court came to believe, however, first in federal criminal cases,[14] then in state cases also, that the Fourth Amendment guarantee was an empty promise without some effective enforcement

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7 See *John Kaplan,* The Limits of the Exclusionary Rule, 26 Stanford L. Rev. 1027, 1028 (1974) ("... any rule which makes rationally probative and often vital evidence against a criminal defendant inadmissible in his criminal prosecution flies in the face of crime control values".).

8 See *Kaplan* (note 7) at 1037.

9 See *Kaplan* (note 7) at 1037.

10 This famous phrase was first used by Judge *Benjamin Cardozo* in People v. Defore, 242 N.Y. at 21, 150 N.E. at 587.

11 See *Kaplan* (note 7) at 1031-1032 (other countries reject such a rule), citing remarks of *Lord Widgery,* Lord Chief Justice of England, American Bar Association Convention, July 16, 1971, reported in N.Y. Times, July 17, 1971, at I, col. 3.

12 See *Akhil Reed Amar,* Against Exclusion (Except to Protect Truth or Prevent Privacy Violations), 20 Harv. J.L. & Pub. Pol'y 457, 459 (1997).

13 See *Amar* (note 12) at 459.

14 See Weeks v. U.S., 232 U.S. 383 (1914). For many years, the Supreme Court refused to extend the exclusionary rule to the states, holding that while the Fourth Amendment's guarantees were enforceable against the states, the exclusionary rule was not required as the enforcement mechanism. See Wolf v. Colorado, 338 U.S. 25 (1949).

mechanism.[15] While the exclusionary rule is not mentioned in the Constitution,[16] they believed it was necessary to give effect to the privacy right that *is* mentioned.[17]

In *Mapp v. Ohio,*[18] the U.S. Supreme Court decided in 1961 to require the American states to apply the Fourth Amendment exclusionary rule. The Court explained that two important interests required adoption of the rule. The first of these, and the one that continues to be used by the Supreme Court to justify the exclusionary sanction, is deterrence of police misconduct. If the police will not be able to profit from an illegal search, they will have no reason to search illegally. The effectiveness of exclusion as a deterrent to this kind of misconduct has never been demonstrated empirically, although there is considerable anecdotal evidence that the rule produces some level of deterrence.[19]

The second rationale for the rule is the so-called "judicial integrity" argument.[20] By using (admitting) evidence known to have been obtained illegally, the court, a state institution, gives its tacit approval to the methods used by the police that produced the evidence being offered. If, as Justice *Brandeis* wrote in *Olmstead v. United States,* the government is the "potent, the omnipresent teacher",[21] it should teach by its example that illegal police methods are unacceptable, as is the evidence that those methods produce.

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15 See Mapp v. Ohio, 367 U.S. 643, 660 (1961).

16 Opponents of the exclusionary rule continue to argue that this lack of express constitutional authority undermines the rule. Proponents of the rule note in response that other, more readily accepted procedural rights also have been inferred from the language of the Constitution without raising any serious question about their validity. See *Yale Kamisar,* A Defense of the Exclusionary Rule, 15 Crim.L.Bull. 5, 16-17 (1979).

17 This position was adopted even by Justice *Hugo Black* who was known for his literal reading of the commands of the Constitution. In his concurring opinion in Mapp, Justice *Black* wrote that, "when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule". Mapp v. Ohio, 367 U.S. 643 (1961).

18 367 U.S. 643 (1961).

19 Even Professor *John Kaplan,* one of the rule's harshest critics, conceded that "the rule does seem to have some effect on police behavior". *Kaplan* (note 7) at 1033.

20 The policy of judicial integrity is found in Mapp v. Ohio, as it was in Weeks: "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." 367 U.S. 643, 659 (1961).

21 277 U.S. 438, 485 (1928). Justice *Brandeis'* famous passage is: "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." Id.

The Supreme Court's decision in *Mapp v. Ohio* meant that the states were no longer free to exclude illegally obtained evidence or not, as they chose. Every state court in the nation was required after *Mapp* to suppress evidence obtained in violation of the U.S. Constitution. While many states had adopted some form of exclusionary rule in their own courts, many others had rejected exclusion as a remedy for police misconduct. Under the American system of federalism, this meant that before 1961 a federal prosecutor could not use evidence obtained illegally because the exclusionary rule applied in federal courts, but, at least in a state with no exclusionary rule, the federal prosecutor could hand over that evidence to the state prosecutor, and it could be used to convict a defendant of a state crime in state court.[22] After the decision in *Mapp v. Ohio,* this was no longer possible because illegally obtained evidence was inadmissible in every court in the United States.

The extension of the exclusionary rule to state courts signaled an explosion of Fourth Amendment litigation at all levels of the American criminal justice system. In the years following *Mapp,* courts were forced to examine and explain every aspect of search and seizure law, and the resulting body of law is virtually unmanageable both in scope and complexity. One of the first issues raised, even before *Mapp v. Ohio* was decided, was how far the "taint" of police misconduct could reach.[23]

If, for example, police officers illegally enter a person's house and find narcotics, it is clear that the drugs are the "fruit" of the illegal entry and are tainted by it. They are inadmissible in the trial of the possessor. But if that person told the officers that he obtained the drugs from another person, and acting on that information, the police obtained a warrant and found drugs in a search of the other person's house, are those drugs admissible? Or are they the so-called "fruit of the poisonous tree" because the police would not have discovered the drugs if they had not illegally entered the first person's house?

22 See Mapp v. Ohio, 367 U.S. 643, 657-658 (1961). The reverse of this practice was the admission in federal court of evidence unconstitutionally seized by state officers and given to federal agents. Under the so-called "silver platter" doctrine (because the evidence was handed to the federal government on a "silver platter"), federal courts admitted evidence obtained by state officers even if the way in which it was seized would have caused it to be excluded had it been obtained by federal officers. This practice was eliminated in Elkins v. United States, 364 U.S. 206 (1960).

23 See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Complicated lines of cases developed addressing questions of this sort.[24] If the police acted illegally in some respect, a court is forced to consider whether the evidence before it is tainted by that illegality, or whether the evidence came from some "independent source".[25] Prior illegality (or "taint") does not always render evidence inadmissible. Sometimes the police misconduct is just too far removed from the discovery of the evidence being offered to justify exclusion. And sometimes the police obtain evidence in a legal way even though they did some illegal act. In these cases, the exclusionary rule does not apply.

As the American experience with the rule has lengthened, and as the Supreme Court has become increasingly conservative, the exclusionary rule has become more limited in its reach. The Court has restricted the classes of persons who may claim a Fourth Amendment violation;[26] it has created exceptions to the exclusionary rule;[27] and it has even redefined the language of the Fourth Amendment to permit more intrusive police investigations.[28]

The debate about the exclusionary rule usually is conducted by comparing the "costs" of the rule with, and weighing them against, the "benefits" the rule brings.[29] On the "cost" side of the argument, the most compelling argument is that

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24 See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963).

25 See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

26 Persons who do not have "standing" to complain of Fourth Amendment violations may not ask for or obtain suppression of evidence. Changes in the way in which standing is defined have restricted the availability of the exclusion remedy. See *Gerald S. Reamey,* Up in Smoke: Fourth Amendment Rights and the Burger Court, 45 Okla.L.Rev. 57, 77-80 (1992).

27 These include the "good faith" exception for evidence seized pursuant to a warrant when an officer could rely in objectively reasonable good faith on the validity of that warrant, see United States v. Leon, 468 U.S. 897 (1984), and the "inevitable discovery" rule that permits admission of evidence that inevitably would have been discovered through lawful means. Nix v. Williams, 467 U.S. 431 (1984).

28 See Camara v. Municipal Court, 387 U.S. 523 (1967) (departure from individualized probable cause for administrative searches); Terry v. Ohio, 392 U.S. 1 (1968) (adoption of "reasonable suspicion" as standard for investigative detentions and limited weapons searches). For a discussion of the increasing use of "reasonableness" at the expense of "probable cause" in search and seizure cases, see *Gerald S. Reamey,* When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law, 19 Hastings Const. L.Q. 295, 300-322 (1992).

29 The exclusionary rule has been described as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved". United States v. Calandra, 414 U.S. 338 (1974). This characterization suggests that the rule is not required by the Constitution, and must be justified by a cost-benefit analysis. See *Joshua Dressler,* Understanding Criminal

the rule results in criminals going free. Because the exclusionary rule is applied only after incriminating evidence has been seized, and because the evidence usually establishes that the accused is factually guilty, this "cost" is far more obvious than the cost of not employing an exclusionary rule.[30] The American public seems to believe that the existence and use of such a rule results in many criminals going free, but that perception may not be accurate.[31]

The exclusionary rule has its greatest impact in drug cases, probably because almost all drug cases involve search and seizure issues, and because the benefit to the defendant of exclusion is so much greater than in many other kinds of cases. For whatever reasons, one important study concludes that non-prosecution or non-conviction due to application of the exclusionary rule occurs in between 2.8 and 7.1 % of drug cases.[32] An often-cited 1979 study by the General Accounting Office of federal prosecutions found that only 0.4 % of all cases (not just drug cases) were not prosecuted because of search and seizure problems.[33] A third study found evidence being excluded in less than 5 % of the cases in which a search warrant had been issued, and the exclusionary rule preventing conviction in just 1.4 % of those cases.[34] These "costs" are not insignificant, but they do not comport with the perception that the exclusionary rule usually results in the "criminal going free because the constable has blundered".

Critics point to other, hidden costs also. They charge that:

1. The rule does not deter police misconduct because police officers believe the rule is illegitimate and that perjury (lying to the court) is therefore an acceptable way to prevent the rule from being applied;[35]

Procedure 325-326 (2d ed. 1997); *Kaplan* (note 7) at 1032 (argument against rule is that benefits are outweighed by costs).

30 See *Kaplan* (note 7) at 1037.

31 Professor *John Kaplan,* a critic of the exclusionary rule, conceded: "It is undeniably true ... that in practice the exclusionary rule rarely allows dangerous defendants to go free." *Kaplan* (note 7) at 1036.

32 *Dressler* (note 29) at 333-334; *Thomas Y. Davies,* A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 Am.B.Found.Res.J. 611.

33 *Dressler* (note 29) at 334; Comptroller General, U.S. General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979) (Rep. No. GGD-79-45).

34 *Dressler* (note 29) at 334; *Richard Van Duizend/L. Paul Sutton/Charlotte Carter,* The Search Warrant Process: Preconceptions, Perceptions, and Practices 108 (National Center for State Courts 1984).

35 See *Kaplan* (note 7) at 1032.

2. Officers who try to perform their duties correctly often are unable to understand the complexities of search and seizure law.[36] Punishing them for making the wrong choice does not deter intentional wrongdoing, but only causes the officers to hold the courts and the exclusionary rule in contempt; and
3. The availability of the exclusionary rule diverts scarce resources from other defenses that might be investigated and raised, and it causes trial and appeals courts to spend much of their limited time deciding search and seizure issues rather than other, equally or more important issues of criminal responsibility.[37]

On the "benefits" side of the analysis, opponents of the rule charge that it fails to live up to its promise, and that whatever benefits derive from its operation are outweighed by the associated costs. Among other things, they argue that:

1. In cases in which the rule works to exclude evidence, police officers often are not told about the court's ruling or why their actions led to exclusion;[38]
2. In the American criminal justice system, so many defendants plead guilty rather than have a trial that police actions in most cases are not subject to review by the courts.[39] Officers do not learn from their mistakes and are not deterred from misconduct in other cases;
3. Other, more direct and effective ways exist to deter and punish police misconduct. Officers may be subject to private civil actions for damages; they may be disciplined by their agencies; or they might be prosecuted if their actions violate some criminal law;[40] and
4. The exclusionary rule does not operate in cases in which an illegal search or seizure uncovers no criminal evidence. Therefore it benefits only the factually guilty, and not the innocent.[41]

Those who favor the exclusionary rule must concede that it sometimes results in the factually guilty going free. They are quick to note, however, the studies

36 See *Kaplan* (note 7) at 1033.

37 See *William J. Stuntz*, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J.L. & Pub. Pol'y 443, 453-454 (1997).

38 See *Kaplan* (note 7) at 1032-1033.

39 See *Kaplan* (note 7) at 1033.

40 Former U.S. Supreme Court Chief Justice *Warren Burger* proposed such alternatives to the exclusionary rule in his well-known dissenting opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Similar arguments continue to be made by respected scholars, and rejected by others. See *Amar* (note 12) at 463-464.

41 See *Amar* (note 12) at 457-458.

showing that this happens in a relatively small number of cases.[42] Regarding the other "costs" described by the opponents of the rule, they usually respond as follows:

1. It is impossible to know whether, or how often, police officers are deterred by fear that they will lose important criminal evidence. No survey or empirical study can determine the extent to which officers refrain from doing some illegal act, but anecdotal evidence and evidence of increased training and discipline demonstrate that fear of the exclusionary sanction exists, and that police officers and law enforcement agencies respond to that fear.[43]
2. Search and seizure law is complex and difficult for many officers to fully comprehend, but the exclusionary rule provides a powerful incentive for them to learn what is constitutionally permissible, and what is not.[44] Again, increased police training in search and seizure law is evidence that, perhaps because of the exclusionary sanction, law enforcement agencies are equipping their officers to "do the right thing."
3. Exceptions to the exclusionary rule have eliminated some of the causes for police officers' discontent. In cases in which officers have acted reasonably and in good faith, or in which evidence would have been discovered eventually by lawful means, the police are not "punished" by excluding the evidence.
4. The "cost" to the police officer of the exclusionary rule is about right. Because officers care about the outcome of the cases they investigate, and because they care about preventing, detecting, and punishing criminal behavior, they continue to enforce the law aggressively, but not recklessly. Increasing the personal cost to officers, by imposing punitive damages, fines, or criminal punishment, would result in less aggressive, and less effective police work.[45]

Not surprisingly, proponents of the rule find its benefits much weightier than those who oppose it. The proponents' arguments can usually be distilled to the assertion that the exclusionary rule effectively prevents many illegal searches and seizures, and that other methods of deterrence are ineffective or too costly, or both.

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42 See *Dressler* (note 29) at 333-334.

43 See. *Stuntz* (note 37) at 448.

44 See *Lafave/Israel* (note 4) at § 3.1(c) (2d ed. 1992).

45 See *Stuntz* (note 37) at 445-446.

Perhaps the most effective, but difficult to prove argument made by the advocates of exclusion is that the benefits are systemic.[46] One observer has summarized this goal as follows:

> The exclusionary rule is meant to deter unconstitutional police conduct by promoting professionalism within the ranks, specifically by creating an incentive for police departments to hire individuals sensitive to civil liberties, to better train officers in the proper use of force, to keep officers updated on constitutional law, and to develop internal guidelines that reduce the likelihood of unreasonable arrests and searches.[47]

Police training, discipline, and other indicia of "professionalism" have increased greatly in the years since the adoption of the exclusionary rule.[48] Concern that convictions will be lost pervades the system of prosecution,[49] and while some officers and courts may respond by finding ways to circumvent the rule, the result also is that officers take more care and evaluate more thoroughly before conducting a search or seizure, and that they are forced to learn and understand the laws they apply in order to avoid exclusion.[50] When an officer decides not to act unconstitutionally, the exclusionary rule has had its desired effect, but it is not an effect that any empirical study will be able to measure. These systemic benefits result in much greater protection for innocent citizens than holding the police civilly liable for damages or imposing administrative punishments.[51]

Alternative deterrents to police misconduct, while sometimes effective, cannot replace the exclusionary rule in the American system. Constitutional violations seldom damage citizens in ways that are easily compensable by money.[52] Even where damages are assessed against an officer, he or she is unlikely to be able to pay a significant judgment.

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46 See *Dressler* (note 29) at 331.

47 See *Dressler* (note 29) at 331.

48 See *Dressler* (note 29) at 331; *Stuntz* (note 37) at 448.

49 Remember that state prosecutors in the United States are elected or, less often, appointed by elected officials. Consequently, they constantly worry about the conviction rates earned by their offices, or about losing a conviction in a highly publicized prosecution.

50 Professor *Yale Kamisar* has noted that, contrary to the expressed concerns of members of the law enforcement community, the exclusionary rule does not change the basic constitutional guarantee against unreasonable search and seizure; it only provides a remedy for violations. As he summarized this position: "If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along." *Kamisar* (note 16) at 11-12.

51 See *Lafave/Israel* (note 4) at § 3.1(b).

52 See *Lafave/Israel* (note 4) at § 3.1(b); *Stuntz* (note 37) at 449-450.

Administrative discipline for police misconduct is also a useful deterrent, but in America it will never be sufficient. Unlike most countries, America has a system of federalism that guarantees each governmental subdivision the right to maintain its own police force. Consequently, in any given city within the United States, it would be quite common to find 20 or 30 or more local, county, state, and federal law enforcement agencies working independently, each with its own internal rules and procedures, training, and discipline. In this environment, it will never be possible, as it may be possible in a single, federal law enforcement system, to effectively eliminate police misconduct through administrative measures.

Proponents of the exclusionary rule also continue to argue that "judicial integrity" supports its use. If a court cannot approve an unconstitutional search before it takes place, how can a court approve that same search after the fact by admitting the evidence it produced?[53] To admit evidence obtained illegally is for the government, through its courts, to enjoy the fruits of the illegality at the same time it purports to disapprove of it.

An example sometimes used to illustrate this irony is that of the father who has been to the grocery store with his young child. After they leave the store, the father notices that the child has candy that the father knows he did not purchase. What should the good parent do? He can take the candy from the child, explain why it is wrong to take something from a store without paying for it, and make the child return the candy to the store and apologize for taking it. Or, instead the father could take the candy from the child, explain why it is wrong to take something from a store without paying for it, and then unwrap the candy and eat it in front of the child. When courts make use of illegally obtained evidence, they act like the father who lectures his child about doing the right thing, and then eats the candy.[54]

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53 *Kamisar* (note 16) at 7. As Professor *Yale Kamisar* observed: The courts, after all, are the specific addressees of the constitutional command that 'no Warrants shall issue, but upon' certain prescribed conditions, and if 'not even an order of court would have justified' the police action, ... then 'much less was it within [the officers'] authority' to proceed on their own ... Id.

See Elkins v. United States, 364 U.S. 206, 223 (1960) (judges who admit illegally obtained evidence are "accomplices in the wilful disobedience of a Constitution they are sworn to uphold").

54 Professor *Akhil Reed Amar* apparently would respond that governments do keep stolen goods and other kinds of contraband; therefore, the government does profit from these wrongs and the thief or wrongful possessor is not entitled to have back or control the property. See *Amar* (note 12) at 462-463. Professor *Amar's* analogy is incomplete, however, because in his example the government engaged in no wrongdoing. In exclusion cases, the

Opponents of the exclusionary rule find this rationale difficult to accept.[55] They often remind us that the rule applies only in criminal cases, and not in civil cases, as proof that judicial integrity cannot support the exclusionary rule.[56] This inconsistency, however, argues as much in favor of extending the rule to the American civil system as it does to eliminating it from the criminal system.

Displaying a rare interest in comparative law, opponents of the exclusionary rule also note that, while other legal systems exclude unreliable or irrelevant evidence, they usually have no rule comparable to the American rule regarding search and seizure.[57] This fact, the opponents argue, undermines the integrity justification because all of those other systems surely cannot be operating immorally.[58]

Their argument, however, only distracts us from a legitimate issue. The criminal justice systems of countries not employing an exclusionary rule cannot, by that fact alone, be characterized as "immoral" any more than the American system can be said to be "moral" simply because it has such a rule. Recalling the example of the father dealing with a child who has stolen candy, it might be said, not that the father is moral or immoral because of what he decides to do, but that he teaches morality more effectively by returning the candy to the store.

Whatever the virtues of the judicial integrity argument, it has fallen out of vogue in America.[59] Perhaps this deference to deterrence as the "prime purpose"[60] of the exclusionary rule is due to the practical difficulties inherent in adhering to the integrity rationale.[61] Taking seriously the judicial integrity basis for exclusion would require courts to extend the reach of the rule to civil cases, and to eliminate

government, like the drug possessor, has obtained something in an illegal way. For the same reasons the drug possessor has no right to control the drug, the government should have no right to use and control the thing it possesses illegally.

55 See *Amar* (note 12) at 462.

56 See *Amar* (note 12) at 462; *Dressler* (note 29) at 324.

57 See *Kaplan* (note 7) at 1031.

58 See *Amar* (note 12) at 462 ("[O]ther countries with judicial systems characterized by integrity do not exclude evidence.").

59 Professor *Joshua Dressler* notes: "Since Mapp was decided ... the Supreme Court has de-emphasized the judicial integrity justification of the exclusionary rule to the point of practical extinction". *Dressler* (note 29) at 324.

60 United States v. Janis, 428 U.S. 433, 446 (1976); see *Dressler* (note 29) at 324.

61 See *Dressler* (note 29) at 324; see also *Lafave/Israel* (note 4) at § 3.1(B) (Supreme Court has never taken judicial integrity "to be so important that the rule must be unqualified").

the exceptions the Supreme Court has recognized in criminal cases.[62] It might render the rule too inflexible to be accepted by the public.

In recent years the Supreme Court has not expanded the scope of the exclusionary rule; rather, it has made it less available and diminished its reach. By the same token, the Court has not eliminated the rule, and it seems now to be a fixture of the American criminal justice system. Whatever the future of the exclusionary rule in America may be, it stands as an extraordinary on-going experiment in modifying the behavior of the police, an experiment not without its successes.

It is not clear that the successes of the American exclusionary rule can be obtained in other criminal justice systems, but it is certain that at least some of the costs and benefits would differ from those seen in the United States. In a system with a single federal police force, it may be possible to achieve the same benefits through increased training and uniform disciplinary procedures. Other cultures may be more or less willing than the American public to tolerate the "costs" associated with an exclusionary rule, and the "benefits" derived from a rule may be valued much differently. Notwithstanding these obstacles to comparison, the American experience with exclusion remains an important example that may guide others pursuing the laudable goals the exclusionary rule is designed to achieve.

62 As *Dressler* notes: "The concept of judicial integrity potentially functions as a moral imperative - 'thou shalt not be an accessory to an illegal act' - and, as such, does not seem to allow for cost-benefit analysis of the exclusionary rule." Id.