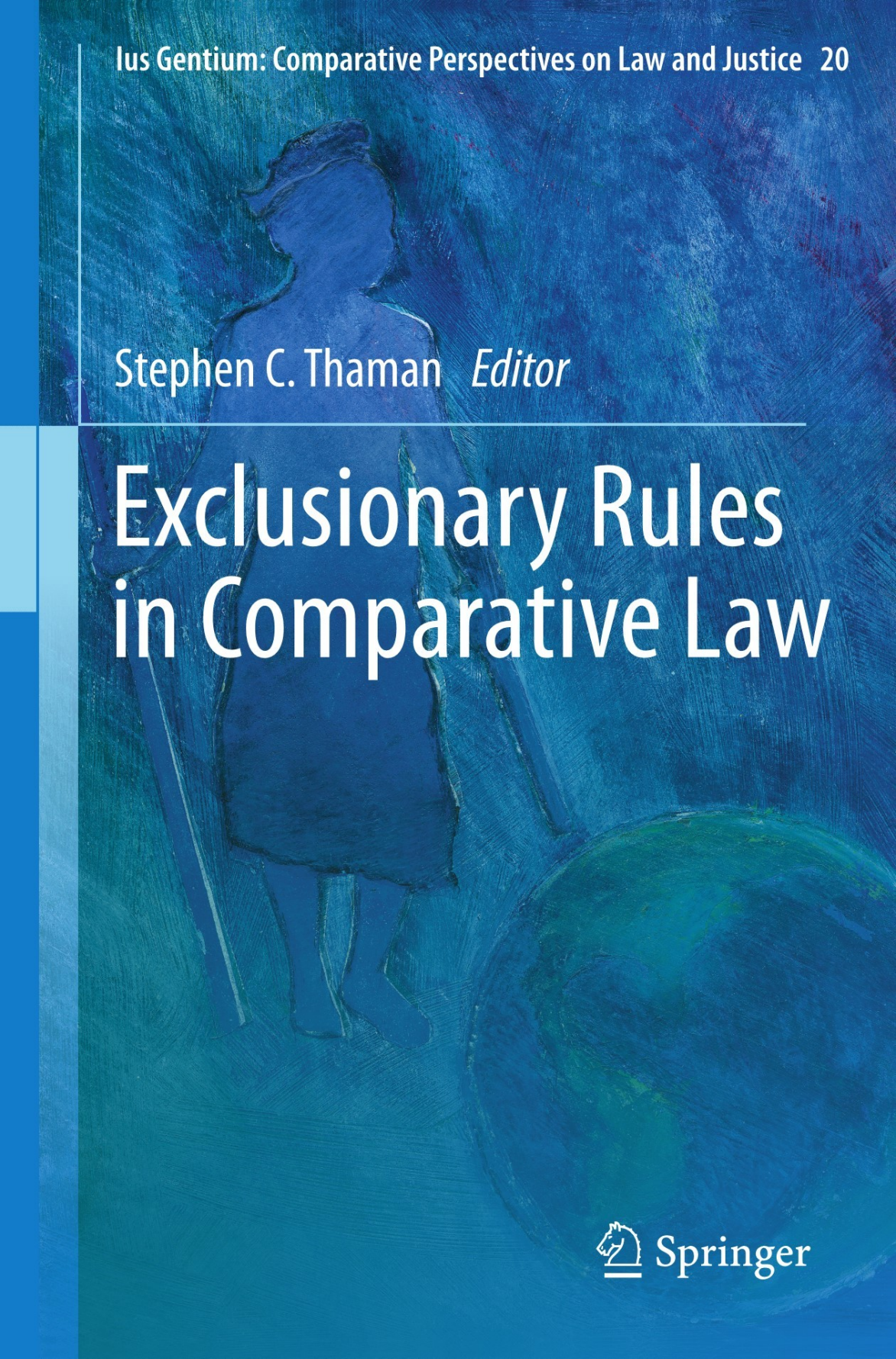
Ius Gentium: Comparative Perspectives on Law and Justice 20

Stephen C. Thaman *Editor*

Exclusionary Rules in Comparative Law



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Exclusionary Rules in Comparative Law

Springer

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ISBN 978-94-007-5347-1 ISBN 978-94-007-5348-8 (eBook)
DOI 10.1007/978-94-007-5348-8
Springer Dordrecht Heidelberg New York London

Library of Congress Control Number: 2012954419

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

To the memory of my dear friend and colleague Prof. Dr. Günter Heine (Ravensburg, 4 June 1952 : Freiburg im Breisgau, 25 June 2011), a great criminal law scholar, who paved the way for my academic career and whom I sorely miss.

Acknowledgements

I would like to thank my two research assistants who helped me in the 2 years it took me to edit this book: Joshua Walker, who also worked on the translations of the chapters on Belgium and France from French to English, and Emily Williams, who worked on the final citechecking and formatting.

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Introduction

Stephen C. Thaman

This book, *Exclusionary Rules in Comparative Law*, grew out of excellent country studies on the criminal exclusionary rule prepared for the XVIII Congress of the International Academy of Comparative Law (IACL), which was held in Washington, D.C., from July 25 through August 1, 2010. I had the honor of being the general rapporteur for criminal procedure for the congress and also chose the topic for the congress.

What is controversial about what are called "exclusionary rules" in American law, prohibitions on the use of evidence (*Beweisverwertungsverbote*) in German, or simply "non-usability" (*inutilizzabilità*) in Italy, is that they end up depriving the factfinders in criminal trials, whether professional judges, jurors, or lay judges sitting with professional judges in mixed courts, of relevant, material evidence of guilt, because of errors committed by law enforcement personnel in the collection of this evidence. We thus have a real confrontation of two principles of criminal procedure, that of truth-finding, often called the principle of material truth in civil law countries, and that of "due process" to use the Anglo-American term, or the principle of a state under the rule of law or *Rechtsstaatlichkeit*, to use the German term.

The sacrifice of truth in favor of other important values not only occurs through the use of exclusionary rules. In the area of plea bargaining and other abbreviated and consensual methods of avoiding a full trial on the truth of the charges, truth is sacrificed at the altar of efficiency and procedural economy, that is, in order to save time and money.[1] Many criticize the common law jury system with its non-reasoned

[1] I chose this topic when I was general rapporteur for criminal procedure at the XVII Congress of the International Academy of Comparative Law which was held in Utrecht, The Netherlands. See Thaman, S.C. (ed.)(2010), *World Plea Bargaining*, Durham, North Carolina: Carolina Academic Press.

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verdicts and non-appealable acquittal judgments as a system that places ideas of popular democracy above truth-finding.[2] These three topics were traditionally the most disputatious in the academy and served to distinguish adversarial common law systems, which were considered to be the cradle of each of these procedural arrangements, and the inquisitorial civil law systems, which held all three to be anathema. Today, especially in the area of plea bargaining and exclusionary rules, this is no longer the case. As this book shows, exclusionary rules are part and parcel of nearly all criminal procedure systems in Europe and are also becoming more prevalent in other parts of the world.

After I was chosen as general rapporteur on the subject of exclusionary rules, I prepared a questionnaire and sent it to the various country reporters who were either nominated by their country's section of the IACL, or were recruited by me from friends and colleagues. Although I asked the country reporters to address the issues in the questionnaire, I gave them freedom to arrange their reports as they wished so as to make them more readable when published in book form. In the questionnaire I wanted to know, in general, whether the principle of material truth had a constitutional foundation in their countries, whether it was explicitly spelled out in the Code of Criminal Procedure (CCP), or whether if had been developed from the academic literature or in the case law of the high courts. I also wanted to know whether the exclusion of illegally gathered evidence was included as a constitutional mandate, or was introduced by high court jurisprudence, or by legislative enactment. I was interested, as well, in whether the country had a generally worded rule excluding evidence gathered in violation of the law, and whether such exclusionary rule was limited to fundamental or constitutional violations, or was applicable, in addition, to violations of statutory rules.

With respect to more particular exclusionary rules applying to specific violations of laws relating to the gathering or admissibility of evidence, I decided to narrow the scope of the country reports to what I thought were the two most critical areas in which exclusionary rules are used to enforce important human rights protected by both national constitutions and international human rights conventions, that is: (1) where police acquire evidence by violating the universally protected right to privacy in one's home or in one's private conversations and (2) where police violate human dignity, the privilege against self-incrimination and/or the right to silence in obtaining confessions.

This book will not touch on another important exclusionary rule, despite its grounding in constitutional and international human rights law: the exclusion of inculpatory hearsay evidence in the form of witness statements, where the defendant was deprived of the opportunity to confront or examine the witness. Although there is substantial statutory and case law dealing with this exclusionary rule, rooted, *inter alia*, in the Sixth Amendment of the U.S. Constitution, Art. 14(3)(e) of the International Covenant on Civil and Political Rights, and Art. 6 (3)(d) of the

[2] See, for instance, Thaman, S.C. (2011), "Should Criminal Juries Give Reasons for their Verdicts": The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*, *Chicago-Kent Law Review*, Vol. 86, 613–668.

European Convention of Human Rights I felt that this important material does not as glaringly pose the question of truth against due process. This is because the right to confrontation is a purely procedural right that has no impact beyond criminal procedure, unlike the right to human dignity or the right to privacy, and also because the violation of the right to confrontation can never lead to the exclusion of physical evidence of guilt, but only to words, which, whether in the form of prior witness testimony, confessions, or intercepted telephone conversations, are not always reliable and credible indicia of guilt.

In the end, 24 country reports and a report on the jurisprudence of the European Court of Human Rights (hereafter ECtHR) were submitted and temporarily published on the website of the XVIII Congress of the IACL. I wrote the general report for the Washington congress and referred to the wealth of information that I learned in these reports.[3] Although much of the groundwork for Chap. 17 of this book, my general theoretical treatment of the exclusionary rule, is based on my general report for the conference, they are in no way identical. I have expanded and re-organized the material in the general report in a more concise and theoretically consistent manner, giving Chap. 17 a closer likeness to an article I later wrote, which was published in the University of Toronto Law Journal.[4]

I received the following reports as general rapporteur for the Washington conference: Belgium, written by Marie-Aude Beernaert, of the Catholic University of Louvain and Philip Traest, of the University of Ghent; Brazil, written by Ana Paula Zomer Sica, State Procurator in São Paulo and Leonardo Sica, a lawyer in São Paulo; the Czech Republic, written by Jaroslav Fenyk of Masaryk University in Brno; England and Wales, written by Andrew Choo, University of Warwick; Finland, written by Hannu Kiuru, Helsinki, Vice-President of the Finnish Section of the Comparative Law Association; France, written by Jean Pradel, Professor Emeritus of the University of Poitiers; Germany, written by Sabine Gless, University of Basel, Switzerland; Greece, written by George Triantafyllou, University of Athens; Ireland, written by Yvonne Daly, Dublin City University and Arnaud Cras, University College Dublin; Israel, written by Rinat Kitai Sangero, Academic Center of Law and Business, Jerusalem and Yuval Merin, College of Management School of Law, Rishon LeZion; Italy, written by Giulio Illuminati, University of Bologna; Macao, written by Paulo Martins Chan, Public Prosecutor, University of Macao; the Netherlands, written by Lonneke Stevens and Matthias J. Borgers, Free University of Amsterdam; Norway, written by Runar Torgersen, Public Prosecutor, Oslo; Poland, written by Maria Rogacka-Rzewnicka, University of Warsaw; Portugal, written by Maria João da Silva Baila Madeira Antunes, University of Coimbra; Russia, written by Vladimir I. Rudnev, Institute of Legislation and Comparative

[3] See Thaman, S.C. (2012), "The Exclusionary Rule", in: K.B. Brown & D.V. Snyder (eds.), *General Reports of the XVIII Congress of the International Academy of Comparative Law*, Dordrecht, Heidelberg, London, New York: Springer, 657–704.

[4] Thaman, S.C. (2011), "Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth", 61 *Univ. of Toronto L. J.*, Vol. 61, 691–735.

Law, Moscow; Scotland, written by Fiona Leverick, University of Glasgow and Findlay Stark, Ph.D. Candidate, University of Edinburgh; Serbia, written by Snežana Brkić, University of Novi Sad; Slovenia, written by Ana Pauletič, University of Ljubljana; Spain, written by Lorena Bachmaier Winter, Complutense University, Madrid; Taiwan, written by Jaw-perng Wang, National Taiwan University, Taipei; Turkey, written by Adem Sözüer and Öznur Sevdiren, Istanbul University; United States, written by Mark Cammack, Southwestern School of Law, Los Angeles; and the European Court of Human Rights, written by Pinar Ölçer, University of Leiden, the Netherlands.

I would also like to acknowledge, that the country reporter for Croatia, Prof. Ivo Josipović, University of Zagreb, graciously excused himself for being unable to submit his report. His excuse was rather compelling: he was elected President of Croatia in the meantime! We wish him the best of luck!

Due to space constraints, I could not publish all of the reports in this book, so my choice was based on two factors: (1) what I thought was the importance of the country's approach to the issue of exclusionary rules, and (2) the quality of the report both in the sense of its coverage of the material and its stylistic merits. I regret that we had to leave out many countries, but what I learned from the reports that have not entered this volume will appear in my synthetic, theoretical chapter, which concludes it. For the 16 reports that make up the other chapters of this book, I will cite directly to these chapters when I refer to the law reflected therein. If I cite to the work of the writers who are not published herein, I will cite to the legal sources they cited, or to my general report for the IACL Congress.

Part I of the book will deal with court-made exclusionary rules, and begins with Chap. 1 on the United States, whose famous court-crafted exclusionary rules have had considerable influence in other common law countries, as well as in the civil law world. I will then deal with other common law countries which also have judicially created exclusionary rules: Chap. 2 deals with Ireland, Chap. 3 with Scotland and Chap. 4 with Israel (which has been greatly influenced by common law procedural models). Part I concludes with Chap. 5 on Germany, where the courts have developed a sophisticated balancing test which determines which evidence will be excluded and which will not.

Part II of the book, the longest part, deals with the development in the civil law world which took place from the traditional theory of "nullities" to modern exclusionary rules. It begins, as it should, with Chap. 6 on France, where the concept of "nullities" originated, and where they remain the only vehicles to exclude evidence. It continues with Chap. 7 on Belgium, which inherited the concept of "nullities" from France, but whose courts have gradually developed a balancing test when deciding on the admissibility of illegally gathered evidence. Chapter 8 on the Netherlands, deals with a country coming from a similar tradition, but which has introduced a statutory exclusionary rule which gives judges wide discretion in balancing various factors. Chapter 9 on Spain, Chap. 10 on Italy, and Chap. 11 on Greece present countries coming from the "nullity" tradition, which have enacted modern statutory exclusionary rules which have been the subject of some fascinating judicial interpretations by the high courts of those countries. Finally, Chap. 12 on

Turkey and Chap. 13 on Serbia depict countries emerging from military or authoritarian political systems, which have codified categorical exclusionary rules and whose courts are wrestling with these new developments.

Part III deals with tests for exclusion which, by and large, look at the larger picture in order to determine whether a failure to exclude illegally gathered evidence would violate the defendant's right to a fair trial. Chapter 14 deals with the application of this test in England and Wales, where it was introduced in the Police and Criminal Evidence Act of 1984. The new general exclusionary rule adopted by Taiwan's legislature, described in Chap. 15, can also be seen as a balancing test where the ultimate fairness of the proceedings is the crucial factor. Finally, Chap. 16 deals with the fair trial test applied by the European Court of Human Rights, which was perhaps influenced by the approach in England and Wales. The book then concludes with my synthetic, theoretical approach to exclusionary rules, where I treat all exclusionary rules as results of balancing carried out at the different levels of international and national institutions, whether we are dealing with exclusion of the fruits of torture, or those of mere statutory violations which do not rise to constitutional stature.

And, as we shall see, the most difficult step for any state or even international court to take is to exclude physical evidence—contraband, instruments of crime, or fruits of crime—which is gathered in violation of the law, even of constitutional and human rights guarantees. For physical evidence—if not tampered with—does not lie, it speaks for itself (*res ipsa loquitur*): the murder weapon, the body of a murder victim, the fingerprints, DNA residue, the stolen loot, the illegal stash of drugs. Thus, the treatment of especially these "fruits of the poisonous tree" is the most controversial aspect in most countries, and is the area where truth most clearly begs to be heard, and is reluctant to cede to respect for human rights.

It may surprise readers, that exclusionary rules were traditionally more common in inquisitorial non-jury systems in civil law jurisdictions, in the form of what are called "nullities". If a procedural actor, such as a police officer, investigating magistrate or prosecutor violated a rule of criminal procedure, this could lead to the nullity of the procedural act, and, in some cases, the inadmissibility of evidence related to this violation. Some of these "nullities" are specifically related to certain violations, and others are expressed in general form.

Part I
The Vicissitudes of Court-Made Exclusionary Tests

Chapter 1
The United States: The Rise and Fall of the Constitutional Exclusionary Rule

Mark E. Cammack

1.1 The General Theory of Admissibility of Illegally Gathered Evidence

In 1961 the US Supreme Court (USSC) held in *Mapp v. Ohio*[1] that the exclusion of evidence obtained as a result of an unconstitutional search or seizure is required in state criminal trials as a matter of federal constitutional law. The *Mapp* holding applied only to evidence acquired in violation of the search and seizure protections of the Fourth Amendment. Before the decade was over, however, the Court decided cases creating constitutional exclusionary rules for evidence obtained as a result of violations of two other rights. The 1964 case of *Massiah v. United States*[2] interpreted the right to counsel guaranteed by the Sixth Amendment to require exclusion of statements elicited from the accused in the absence of an attorney after the filing of formal criminal charges. Two years later in *Miranda v. Arizona*[3] the Court relied on the Fifth Amendment right against compelled self-incrimination to mandate exclusion of statements made in response to custodial interrogation unless the suspect had been advised of her rights and voluntarily waived them.

The constitutional exclusionary rules created in *Mapp, Massiah*, and *Miranda* were not the first to require exclusion of illegally obtained evidence in the United States (US). Confessions obtained by means that operated to "deprive [the accused] of that freedom of will or self-control essential to make his confession voluntary"

[1] 367 U.S. 643 (1961).

[2] 377 U.S. 201 (1964).

[3] 348 U.S. 436 (1966).

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S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, Ius Gentium: Comparative Perspectives on Law and Justice 20, DOI 10.1007/978-94-007-5348-8_1,

were inadmissible under the common law of evidence.[4] At the end of the nineteenth century the USSC held that the Fifth Amendment self-incrimination right required the exclusion of involuntary confessions from federal prosecutions as a matter of constitutional law,[5] and in the 1930s the Court established a constitutional exclusionary rule for involuntary confessions in state courts based on the due process clause of the Fourteenth Amendment.[6] Exclusion of evidence obtained as a result of an unlawful search or seizure was required in federal court for nearly 50 years before *Mapp* extended the rule to the states,[7] and a minority of states had required the exclusion of such evidence as a matter of state law prior to the establishment of the Fourth Amendment exclusionary rule in *Mapp*.[8]

The imposition of the constitutional mandates stated in Mapp, Massiah, and Miranda does not foreclose the existence of additional exclusionary rules for illegally obtained evidence based on state law. Because the federal constitution is superior to both constitutional and non-constitutional state laws, the rights protections contained in the US constitution establish a minimum standard that the states must honor. States are free, however, to provide greater protection than federal law requires. But while some states require exclusion of illegally seized evidence beyond what is mandated by the US constitution, in the years since the Supreme Court decided *Mapp, Massiah*, and *Miranda*, the federal constitution has served as the primary standard for admissibility of illegally obtained evidence.

The requirement that the evidentiary fruits of official illegality be excluded from trial has functioned as the principal mechanism for enforcing limitations on the actions of police for nearly 50 years. However, the exclusion of illegally obtained evidence has always been controversial in US law, and while the exclusionary remedy retains its central importance in regulating the conduct of the police, the USSC's approach toward the exclusion of illegally obtained evidence has undergone a major transformation in recent decades. The decisions in *Mapp*, *Massiah*, and *Miranda* generally reflect the view that the exclusion from trial of evidence derived through illegal means is required as a constitutional mandate. In the years since those cases were decided a different interpretation has emerged as a result of a shift in the ideological balance on the USSC beginning in the 1970s. The approach of the current USSC majority to the exclusion of illegally obtained evidence is characterized by a parsimonious conception of the rights guaranteed by the constitution based on (or justified by) a textualist theory of constitutional interpretation. The upshot of this approach has been to demote the exclusionary rule from the status of a right to that of a remedy. In evaluating whether to apply the exclusionary

[4] See, e.g., Hopt v. Utah, 110 U.S. 574, 585 (1884).

[5] Bram v. United States, 168 U.S. 532 (1897).

[6] Brown v. Mississippi, 297 U.S. 278 (1936).

[7] Weeks v. United States, 232 U.S. 383 (1914).

[8] See, e.g., Tucker v. State, 128 Miss. 211 (1922).

rule the Court has applied a balancing test that weighs the deterrent benefits of exclusion against its costs measured in terms of lost evidence. The practical consequence has been to significantly restrict the use of exclusion of illegally obtained evidence as a response to violations of the constitution.

1.2 Rules of Exclusion/Admissibility in Relation to Violations of the Right to Privacy

1.2.1 General Provisions Protecting the Right to Privacy

Because of its federal structure, the US has 51 separate legal systems: the federal system and the 50 state legal systems. Each of the 51 jurisdictions has its own constitution, many of which include protections against governmental intrusions on privacy and personal security. There are also a variety of statutes that protect privacy. While some state laws have significance within the particular state, by far the most important source of legal protection for privacy as it relates to the prosecution of crime is the Fourth Amendment to the federal Constitution.

The text of the Fourth Amendment is brief, speaks in broad generalities, and is notoriously ambiguous. The full 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 persons or things to be seized." There is, however, a vast body of USSC jurisprudence applying the commands of the Amendment in particular cases, and it is these decisions that contain the positive doctrine relating to search and seizure.

The ambiguity of the Fourth Amendment arises from the fact that it includes two seemingly distinct rights or commands. The first part of the Amendment—the "unreasonableness" clause—guarantees the right of the people to be secure against searches and seizures that are "unreasonable"; the second part of the Amendment—the warrant clause—specifies requirements for a valid warrant. The most important requirement is that the warrant be supported by probable cause.

The language of the Fourth Amendment does not, on its face, clarify the relationship between the prohibition against unreasonable searches and seizures and the requirement of probable cause for warrants. While the correct interpretation of the Fourth Amendment continues to be debated, the USSC's application of the Amendment has generally assumed that the two clauses should be construed together as expressing a unified rule for the legality of government searches and seizures. Although the syntax of the Fourth Amendment would seem to indicate two separate norms, the second, warrant clause, has generally been taken as establishing the standard for when a search or a seizure is reasonable under the first clause. The assumption underlying much of the Court's Fourth Amendment jurisprudence is that in order to be constitutionally reasonable, a search or seizure must be carried out pursuant to a warrant that is supported by probable cause.

The first ten amendments to the constitution known collectively as the Bill of Rights were added in 1791, 2 years after the constitution itself was ratified. At the time of their enactment the Bill of Rights were clearly intended as limitations on the powers of the federal government, and for the better part of a century had no relevance to the states. The relationship between the states and the federal government changed dramatically in the latter part of the nineteenth century as a result of amendments to the US constitution following the civil war. The most important change as it relates to criminal procedure is language in the Fourteenth Amendment that guarantees a right against state deprivations of life, liberty or property without "due process of law". The full implications of this provision were not realized for many decades, but it eventually resulted in the extension of most of the criminal procedure protections in the Bill of Rights to the states. Today the terms of the Fourth Amendment limit the actions of state officials in precisely the same way they limit the federal government.

The substantive protections of the Fourth Amendment apply to "*searches* and *seizures*" of "persons, houses, papers, and effects" (emphasis added). This language encompasses several distinct interests; a search entails interference with privacy, while a seizure relates to possessory interests or the interest in personal liberty. Fourth Amendment doctrine has developed to reflect the different interests involved in a search and a seizure as well as the different interests implicated by particular types of searches and seizures.

Although the Fourth Amendment has been in existence for more than two centuries, most of the contemporary law of search and seizure is contained in USSC decisions rendered in the past 50 years. Much of the current Fourth Amendment doctrine relating to searches traces its source to the USSC's 1967 decision in *Katz v. United States*.[9] Under the framework established in *Katz*, the threshold question is whether the means by which the challenged evidence was acquired infringed the defendant's reasonable expectation of privacy. If the evidence was obtained as a result of a search subject to Fourth Amendment regulation, and if the search was not conducted pursuant to a valid warrant, then the discovery of the evidence is unlawful unless the facts satisfy an exception to the general requirement of a warrant and probable cause.

The reasonable expectation of privacy test announced in *Katz* represents an advance over the Court's earlier approach, but it has nevertheless been justly criticized as both circular and difficult to apply. The crux of the inquiry requires a determination whether an individual's expectation that certain facts shall remain private is one that society is prepared to recognize as reasonable or legitimate. The Court has devised a number of ostensibly objective criteria for answering that question, but the application of those criteria has been inconsistent and based on dubious assumptions, and the nearly inescapable impression is that the stated grounds for the decisions conceal an implicit balancing of the burden of a particular investigative technique on privacy against its utility in obtaining evidence of crime.

[9] 389 U.S. 347 (1967).

As one leading commentator has written, the determination whether particular police conduct constitutes a search inevitably involves a "value judgment" as to "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional constraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society".[10]

In the 40-odd years since the *Katz* test was first announced the USSC has applied it to a variety of forms of police investigation. The Court has found, for example, that the Fourth Amendment is not implicated in the gathering of evidence through the use of informers or undercover police posing as partners in crime.[11] The reason given for this rule is that the defendant assumes the risk that his misplaced confidences will be communicated to the police and used as evidence. The Court relied on the same assumption of the risk rationale to find that it is not a search for police surreptitiously to record the numbers dialed from the defendant's home telephone through the use of a pen register.[12] The Court has held that the use of an airplane[13] or a helicopter[14] to view the defendant's yard is not a search on the grounds that one could not reasonably expect privacy from such observations since the facts seen by the police could have been observed by any member of the public who happened to fly over the defendant's yard. By the same logic, the use of an electronic tracking device to track the progress of a car on public streets is not a search since the car's movements are plainly visible.[15] The Court reached a different conclusion in a case in which a tracking device placed inside a container revealed that the container was moved inside a home.[16] The fact that the investigation focused on the home was also apparently the critical factor in a decision that the use of a thermal imaging device to measure relative amounts of heat emanating from various parts of the defendant's house was a Fourth Amendment search.[17]

Although the USSC continues to reiterate that a search is considered unreasonable unless it is carried out pursuant to a warrant based on a judicial finding of probable cause the requirement of a search warrant is subject to significant exceptions.[18] The USSC has long recognized that it is constitutionally reasonable for police to search without a warrant based on their own evaluation of probable cause when an immediate search is necessary because of exigent circumstances.[19]

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[10] Amsterdam (1974, 403).

[11] United States v. White, 401 U.S. 745 (1971).

[12] Smith v. Maryland, 442 U.S. 735 (1979).

[13] California v. Ciraolo, 476 U.S. 207 (1986).

[14] Florida v. Riley, 488 U.S. 445 (1989).

[15] United States v. Knotts, 460 U.S. 276 (1983).

[16] United States v. Karo, 468 U.S. 705 (1984).

[17] Kyllo v. United States, 533 U.S. 27 (2001).

[18] As Justice Clarence Thomas commented in one recent case, "our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." Groh v. Ramirez, 540 U.S. 551, 573 (2004) (Thomas, J., dissenting).

[19] See, e.g., Warden v. Hayden, 387 U.S. 294 (1967).

The Court has also created an exception to the requirement of a warrant (though not the requirement of probable cause) for searches of automobiles.[20] Searches based on consent[21] and inventory searches undertaken for reasons unrelated to the search for evidence[22] are reasonable in the absence of both probable cause and a warrant.

1.2.2 Admissibility of Illegally Seized Evidence

The Fourth Amendment prohibits unreasonable searches and seizures and establishes requirements for the validity of judicial warrants, but the text is silent with respect to the consequences of a violation of these commands. It was only in the twentieth century that exclusion of unlawfully obtained evidence from use at trial came to be accepted as a means of enforcing the Fourth Amendment. The nearly universal rule prior to that time was that "[t]he law deliberates not on the mode, by which [evidence] has come to the possession of the party, but on its value in establishing itself as satisfactory proof".[23] The only remedy for violation of constitutional or other rules regarding search and seizure was a civil suit for trespass against the offending party. As was stated in a nineteenth century decision of the Massachusetts Supreme Judicial Court:

> If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.[24]

The principle that a violation of the constitutional right to be free from unreasonable searches and seizures requires exclusion of the evidentiary fruits of the violation was first suggested in 1886 in *Boyd v. United States*,[25] but it was not until 1914 in *Weeks v. United States*[26] that the USSC declared exclusion to be required as a matter of law. Although the precise basis for the *Weeks* decision is not free from doubt, the Court appears to view the admission of illegally obtained evidence as a violation the Fourth Amendment. The Court wrote that "[t]he 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 as to the exercise of such power

[20] See, e.g., California v. Acevedo, 500 U.S. 565 (1991).

[21] See, e.g., Schneckloth v. Bustamonte, 412 U.S 218 (1973)

[22] See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976).

[23] United States v. The La Jeune Eugenie, 26 F. Cas. 832, 844 (Cir. Mass.,1822).

[24] See, e.g., Commonwealth v. Dana, 43 Mass. 329, 337 (1841).

[25] 116 U.S. 616 (1886).

[26] 232 U.S. 383 (1914).

and authority".[27] and that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, 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".[28] In announcing its holding the Court stated that "there was involved in the order refusing the application [to exclude the evidence] a denial of the constitutional rights of the accused".[29]

At the time *Weeks* was decided the substantive protections of the Fourth Amendment were not applicable to the actions of state officials, and the exclusionary rule announced in *Weeks* applied only to cases prosecuted in federal court. Although state constitutions and statutes included protections against official intrusions on privacy, only a minority of states prohibited the use of the fruits of unlawful searches or seizures as evidence. In 1949 the USSC held in *Wolf v. Colorado*[30] that the due process guarantee of the Fourteenth Amendment encompasses the same prohibition against unreasonable searches and seizures stated in the Fourth Amendment. The effect of this ruling was to impose on state officials as a matter of federal constitutional law the same restrictions applicable to federal officials under the Fourth Amendment. The Court also held, however, that the exclusionary rule announced in *Weeks* and applicable to Fourth Amendment violations by federal officials did not apply to violations by state officials.

Twelve years after Wolf was decided the USSC reversed itself. In *Mapp v. Ohio*[31] the Court held that the exclusionary rule announced in *Weeks* applies to the fruits of unlawful seizures carried out by agents of the state and offered in criminal prosecutions before state courts. The *Mapp* holding is necessarily based on the US constitution since that is the sole basis of the USSC's power over the conduct of state trials. However, the fact that the exclusionary rule is constitutionally based does not fully resolve the relation between the rule of evidence and the Fourth Amendment right, and the Court's opinion in *Mapp* is on that issue somewhat equivocal. There is language in *Mapp* supportive of the understanding of the exclusionary rule expressed in *Weeks* as an inseparable component of the Fourth Amendment right. The Court described the exclusionary rule as "an essential part of both the Fourth and Fourteenth Amendments",[32] and held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court".[33] In explaining why the exclusionary rule was constitutionally required the Court stated that, in the absence of a rule requiring exclusion of illegally obtained evidence, "the freedom from state invasions of privacy would

[27] Ibid, 391–92.

[28] Ibid, 393.

[29] Ibid, 398.

[30] 338 U.S. 25 (1949).

[31] 367 U.S. 643 (1961).

[32] Ibid, 657.

[33] Ibid, 655.

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'".[34]

These statements suggest that the admission of illegally seized evidence in state criminal trials is itself a violation of the federal constitution. There is other language in *Mapp*, however, that supports the understanding of the exclusionary rule articulated in *Wolf* as a judicially created prophylactic mechanism for effectuation of constitutional privacy protections. The Court quoted language from a case decided the year before describing the exclusionary rule as designed "to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it".[35] A substantial portion of the opinion is devoted to an argument that the experience of states with alternatives to the exclusionary rule has proven other remedies to be ineffective. The premise of this argument is that the exclusionary rule is constitutionally required or justified not because admission of illegally seized evidence violates the constitution but because all other enforcement mechanisms have failed. While the Court labeled these "factual considerations" as "not basically relevant" to the decision, the inclusion of the argument would seem to indicate a degree of ambivalence over the grounds for the decision.

Although the constitutional exclusionary rule has served as the principal enforcement mechanism for violations of the law of search and seizure for nearly half a century, the jurisprudential foundations and legitimacy of the rule continue to be disputed. While the membership of the USSC has always included both supporters and critics of the exclusionary rule, the balance of views has shifted in recent decades. In the years after *Mapp* a majority of the USSC seemed to regard the admission of illegally seized evidence as a violation of the constitution. Although the timing of the shift cannot be pinpointed with precision, the current USSC majority clearly takes a different view. The Court has unequivocally rejected the proposition that exclusion of illegally seized evidence is required by the Fourth Amendment, and regards the exclusionary rule as a judicially created deterrent remedy designed to protect the right against unreasonable search and seizures.

The contrasting understandings of the exclusionary rule received particularly clear expression in the opinions filed in the 1984 decision in *United States v. Leon*,[36] the case in which the Court first recognized the so-called "good faith" exception to the exclusionary rule. The majority opinion in the case was written by Justice Byron White, a long-time advocate for the view that the benefits of the exclusionary rule, in deterring violations of the Fourth Amendment, should be weighed against the costs of lost evidence, and that application of the rule should be limited to situations where its deterrent potential is significant. Justice White rejects the view that

[34] Ibid.

[35] Ibid, 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[36] 468 U.S. 897 (1984).

"the exclusionary rule is a necessary corollary of the Fourth Amendment".[37] The exclusion of illegally seized evidence is not itself a part of the Fourth Amendment guarantee since "the wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself".[38] That conclusion is based on the text of Fourth Amendment, which "contains no provision expressly precluding the use of evidence obtained in violation of its commands", and on an examination of the Amendment's origins and purposes, which "makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong'".[39] Because a violation of the Fourth Amendment is complete upon the occurrence of an unlawful search or seizure, the exclusionary rule cannot and was not intended to serve as a "cure" for the constitutional violation. Much like a civil suit for damages, the rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved'".[40]

The dissenting opinion of Justice Brennan in *Leon* sets forth the alternative understanding of the Fourth Amendment exclusionary rule that regards the right against governmental interference with privacy or liberty and the right to exclude the fruits of that interference as "coordinate components of the central embracing right to be free from unreasonable searches and seizures".[41] Justice Brennan's conclusion that the exclusionary remedy is inseparable from the underlying substantive guarantee is premised on a belief that the prohibition against unreasonable search and seizure is directed at the government as a whole, including the courts, and that exclusion of illegally obtained evidence is necessary to give effect to the Amendment's essential purpose.

> The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected…. Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally seized evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.[42]

Thus, when courts admit illegally obtained evidence they become complicit in a violation of the constitution. As Judge (later Justice) Benjamin Cardozo stated in a case rejecting the exclusionary rule as a matter of state law, "[t]he thought is that in appropriating the results, [the court] ratifies the means".[43]

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[37] Ibid, 905.

[38] Ibid, 906 (quoting United States v. Calandra, 414 U.S. 338, 454 (1974)).

[39] Ibid, (quoting United States v. Calandra, 414 U.S. 338, 454 (1974)).

[40] Ibid, (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[41] Leon, 468 U.S. at 935 (Brennan, J., dissenting).

[42] Ibid, 932–933.

[43] People v. Defore, 242 N.Y. 13, 22 (1926).

Identifying the jurisprudential basis for the Fourth Amendment exclusionary rule is of more than simply academic significance. To begin, the question of the source and basis of the rule may determine whether the rule survives. If the constitution guarantees a right against the use at trial of evidence seized in violation of the Fourth Amendment then neither Congress nor the USSC has the power to abolish it. On the other hand, if the exclusionary rule is deemed to be a judicially created mechanism for protecting the Fourth Amendment by preventing its violation there presumably exist circumstances in which the Court that fashioned the rule could also do away with it.

In addition to its importance to whether the USSC or Congress could someday abolish the Fourth Amendment exclusionary rule, the question of the jurisprudential foundation for the rule also bears on the scope of its current application. This is because the characterization of the rule as either a constitutional right or a judicially fashioned remedy profoundly affects the degree of control courts may exercise over the rule's scope and application. The USSC has the power to define the circumstances in which constitutional rights may or may not be enforced only within narrow limits. As a general matter, enforcement of a constitutional right can be set aside only on the basis of a countervailing constitutional command. The Supreme Court's power over a rule of its own making is much broader. Under the majority view the use of evidence obtained as a result of an unlawful search or seizure is not itself a cognizable injury but exists in the service of an analytically distinct right of privacy. Like a civil action for damages, the exclusionary rule is understood as a forward-looking behavioral device for discouraging the police from engaging in unlawful searches or seizures by removing the evidentiary profits. Understood within this framework, the question whether illegally seized evidence should be excluded depends on whether exclusion will sufficiently advance the rule's deterrent purpose.

1.2.3 The Fruit of the Poisonous Tree Doctrine

In *Weeks v. United States*—the case in which the exclusionary rule was first announced—the evidence that was ordered suppressed was discovered and seized during the course of the unlawful search that constituted the predicate for invoking exclusion. The USSC has made clear, however, that the facts of that case do not define the full reach of the Fourth Amendment exclusionary rule, since limiting exclusion to the immediate fruits of official misconduct would seriously compromise if not entirely vitiate the rule's effectiveness. That point is forcefully illustrated by the facts of *Silverthorne Lumber Co. v. United States*[44] decided by the USSC in 1920. The posture of the case when it reached the USSC involved a challenge to an order holding the petitioners in contempt of court for their refusal to surrender

[44] 251 U.S. 385 (1920).

documents demanded by the prosecutor pursuant to subpoena. The documents at issue had earlier been seized during a search of the petitioners' offices, but were then returned to the petitioners after the search was found to have been unconstitutional. Before returning the documents, however, the prosecutor made copies of their contents. The information gained as a result of the illegal seizure of the documents was then used to obtain the subpoena that commanded their surrender.

Sanctioning the scheme used in *Silverthorne* would go a long way toward nullifying the exclusionary rule and, as Justice Holmes' opinion in the case stated, "[i]t reduces the Fourth Amendment to a form of words".[45] For that reason the reach of the exclusionary rule is not confined to evidence discovered as a direct consequence of a constitutional violation. "The essence of a provision forbidding the acquisition of evidence in a certain way," according to the Court, is "not merely [that] evidence so acquired shall not be used before the Court but that it shall not be used at all". [46] In terms of the fruit of the poisonous tree metaphor by which the doctrine is commonly articulated, the rule requires exclusion of both "direct" or "primary" as well as "indirect" or "derivative" fruits of unconstitutional official conduct.[47]

1.2.4 The Standing Doctrine

Under the fruit of the poisonous tree doctrine all evidence obtained as a causal consequence of a violation of the Fourth Amendment is presumptively inadmissible. However, the doctrine has never been interpreted as absolute or unqualified. Probably the most significant limitation on the application of the Fourth Amendment exclusionary rule is the standing doctrine. The concept of standing is not peculiar to the Fourth Amendment but is used throughout the law to identify which parties are entitled to claim the benefit of a legal rule or duty. Similarly, the requirement of standing is unrelated to the nature of the remedy that is being claimed. A party seeking money damages for a violation of the Fourth Amendment must satisfy the same standing requirements as a party seeking the exclusion of illegally obtained evidence in a criminal prosecution.

Whether a party has standing to claim a constitutional protection depends on whether that party "belongs to the class for whose sake the constitutional protection is given".[48] As is true of constitutional rights in general, rights under the Fourth Amendment are regarded as strictly personal. This means that only those who have

[45] Ibid, 392.

[46] Ibid.

[47] The fruit of the poisonous tree metaphor was first suggested in an opinion by Justice Frankfurter in a case involving the admissibility of evidence obtained as a result of a violation of a federal statute, Nardone v. United States, 308 U.S. 338 (1939), but was later extended to the constitutional exclusionary rule as well. Wong Sun v. United States, 371 U.S. 471 (1963).

[48] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907).

themselves suffered a Fourth Amendment violation are entitled to assert the violation and secure a remedy. In order to obtain the benefit of the exclusionary rule the party seeking exclusion "must have been a victim of a search or seizure … as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else".[49]

The rule that only those who have suffered an unlawful search or seizure are entitled to invoke the exclusionary rule is arguably in tension with the current rationale for the rule as designed to deter Fourth Amendment violations. The logic of deterrence would seem to dictate that applying the exclusionary rule more widely would have the effect of further reducing the frequency of Fourth Amendment violations. Indeed, limiting the exclusionary rule to the victims of unlawful searches or seizures opens the possibility that police will conduct searches they know are unlawful in anticipation that those against whom the unlawfully obtained evidence is to be used will lack standing to seek exclusion.[50]

The Supreme Court has acknowledged that expanding the scope of the exclusionary rule by making it available to parties against whom unlawfully seized evidence is being used would increase the rule's deterrent impact. In explaining its refusal to extend exclusion beyond those who have suffered a Fourth Amendment violation the Court has emphasized that the gains in deterrence achieved through applying the exclusionary rule more broadly must be balanced against its cost in terms of lost evidence and possibly lost convictions. The Court has held that the balance of costs and benefits does not warrant expanding exclusion beyond the victims of unlawful searches or seizures. It has adhered to that view even when it had the effect of permitting the government to use the evidentiary fruits of a deliberate violation of the Fourth Amendment. In *United States v. Payner*[51] investigators for the Internal Revenue Service conducted a search of a banker's briefcase that they knew was unlawful after being advised that the standing doctrine would prevent bank customers against whom the illegally obtained documents were to be used from objecting to their admission at trial. Although acknowledging the interest in deterring "deliberate intrusions into the privacy of persons who are unlikely to become defendants in a criminal prosecution,"[52] the USSC concluded that that interest "does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices".[53]

Just as states may provide greater protection against searches and seizures under their own constitutions than is guaranteed by the Fourth Amendment, states may also apply their own exclusionary rules more broadly than the federal rule. Nearly

[49] Jones v. United States, 362 U.S. 257, 261 (1960).

[50] See, e.g., Rakas v. Illinois, 439 U.S. 128, 157 (1978) (White, J. dissenting) (stating that decision that passengers qua passengers do not have standing to contest search of car amounts to declaring "open season" on search of cars as far as passengers are concerned).

[51] 447 U.S. 727 (1980).

[52] Ibid, 733.

[53] Ibid, 735.