Exclusionary Rule: Viability in 1997

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Abstract

The current interpretation of the Fourth Amendment allows evidence obtained from improper searches to be suppressed and not used in trial. This practice, known as the Exclusionary Rule, prohibits the jury from hearing all evidentiary facts about the crime being tried and at times, allows a defendant to go free due to illegally obtained evidence. The Exclusionary Rule has been a part of criminal proceedings for 83 years and has been modified often since its inception. This research examines the current beliefs about the usefulness of the Exclusionary Rule among criminal justice professionals and possible alternatives as it pertains to the rights of individuals versus the safety of the general public. In general, the study indicates the belief that the Exclusionary Rule is inseparable from the Fourth Amendment and viable constitutional alternatives do not exist. Also indicated is the belief that police officers' misunderstanding and lack of training are responsible for evidence being suppressed.

Introduction

Black's Law Dictionary defines the Exclusionary Rule as: "This rule commands that where evidence is obtained violating the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant. Under this rule, evidence obtained by an unreasonable search and seizure is excluded from admissibility under the Fourth Amendment"(Black, 1990).

The application of the Fourth Amendment is critical to any criminal investigation. The proper use of the vague words which comprise the Fourth amendment and the ever-changing interpretations are instrumental in a conviction of a suspect. An improper search or seizure, as viewed by the court, can nullify the most incriminating evidence. This "exclusion" of evidence from the trial and thus the jury's review, has been debated in countless courtrooms since it was first applied in 1914 by the U.S. Supreme Court.

The Exclusionary Rule, a byproduct of the Fourth Amendment, was first applied in Weeks v. United States (232 U.S.1914). Since that case, the police have been scrutinized on how they obtain items via search and seizure. Sanctions for an improper search and seizure may be that the evidence is not admitted in the trial.

The theme of this study is the viability of the Exclusionary Rule in today's environment. Since the U.S. Supreme Court's first interpretation brought the Exclusionary Rule into the rules of evidence, the rule has seen a metamorphosis. There have been many changes in the application of the Exclusionary Rule depending on the make up of the court. The questions raised in this study center on the effect of the Exclusionary Rule in trial outcomes and if alternatives to the suppression of evidence are viable to practicing criminal justice professionals.

Case law and the narrative of the justice writing the opinion for the Court comprise most literature examining the Exclusionary Rule. Also included in this study is a brief history of the Exclusionary Rule tracking its application from Weeks through its current application. Since the interpretation of the constitutionality of this and other legal issues are in constant flux, finding the latest literature on any one issue is difficult. This study

does not rely on the current application, but attempts to investigate the effect on law enforcement, the rule's status in a changing environment, and opinions of criminal justice professionals on possible alternatives to suppression of evidence.

Several high profile cases have magnified the application of the Exclusionary Rule. Cases such as Ted Bundy, Wayne Williams, Richard Alt, John Wayne Gacy, Jeffrey Dahmer, and O.J. Simpson all had significant evidence challenged and either suppressed or admitted. What would the effect have been if the ruling on the evidence had been different in these cases? Would Ted Bundy not be convicted or would O.J. Simpson now be in prison? Although these questions will not be answered in this paper, the question of the continued usefulness of or alternatives to the Exclusionary Rule are interesting.

The Exclusionary Rule has been in effect in our courts since 1914 and now, 83 years later, the core of the rule is still one of the most argued legal points in criminal court. Justice Black stated, "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence that Congress might negate." (Wolf v. Colorado, 1949). Has the time come for Congress or the Court to act?

Research Questions

1. What, if any, changes need to be made because of the impact of the Exclusionary Rule?
2. Are there alternative sanctions that can be levied against law enforcement agencies other than suppressing evidence obtained in violation of the 4th amendment?
3. How common is suppression of evidence?
4. What are the primary reasons that evidence is suppressed according to the Exclusionary Rule?

Method

The question of the current usefulness of the Exclusionary Rule is one that touches many different facets of the criminal justice system. To find out how the criminal justice community thinks about the continued use of the Exclusionary Rule, a method was needed to contact different layers of the criminal justice system to which the Exclusionary Rule has a direct effect. To accomplish this, several questionnaires were developed and sent to the State Attorney and Public Defender in each of the 20 judicial circuits, and 20 police officers. In addition, surveys were sent to the State Wide Prosecutor and the Dade County chapter of the American Civil Liberties Union. Interviews were also conducted with two police legal advisors, a First District Court of Appeals judge, a law professor who specializes in evidence law, and the Dade County Executive Director of the American Civil Liberties Union.

The questionnaires were designed with some questions for the specific target group, however, all questionnaires had the same specific questions relating to the use and alternatives to the Exclusionary Rule. The specific questions for the state attorneys and public defenders involved the ratio over the past three years of cases dismissed due to the suppression of evidence. Other questions relate to any alternatives to the use of

the Exclusionary Rule and the causes of the suppression. (See appendix for survey forms).

Contact was made with four separate police departments and a request was made for the selection of five officers from each department chosen systematically. Selection of the 20 officers surveyed were made by five officers who were selected systematically from four police departments in the northwest section of Broward County, Coral Springs, Coconut Creek, North Lauderdale, and Margate. The only criteria were that the officers have at least five years of law enforcement experience. The selection was made by taking every seventh officer by identification or badge number starting with the lowest number from the municipality's list of sworn officers. The data received from the officers was equally weighted without regard was given for rank or current assignment. The selection process was designed to provide a greater possibility that the officer would have had some experience with the suppression of evidence in a criminal proceeding. This survey requested information on the officer's direct involvement with the Exclusionary Rule and the outcome of any trial in which the Exclusionary Rule was a factor.

Finally, the interviews were designed to elicit information and thoughts from experts in the area of evidence and the application of the Exclusionary Rule. The interviews were conducted with the same set of questions for both the state attorneys or the public defenders. The only variation was that the follow-up questions were not scripted but were used for clarification and further exploration of the subject.

In reviewing the methodology for this project, I have identified several possible flaws in the method design. Since I have only surveyed public defenders, there are no private criminal defense attorneys included in the surveyed group. This does limit the thoughts on this subject to only governmental defense attorneys. The decision to limit the surveys to the state public sector was made for time and resource reasons and it was felt this group would give a good representative sample from the state of Florida. Also, the surveying of only state attorneys from the state of Florida will not give a national view of prosecutors, just a view on the subject from this state. However, as stated before, it should give a good representative sample on the use of the Exclusionary Rule as the rule is currently used.

The officers surveyed are from a limited geographical area. This again was due to limited time, resources and the ease of distributing and collecting the surveys. A greater range of officers would give a more representative response and a more diverse base. Although the sample is not broad based, this sample will give a selected view of officer perspective on this subject.

Results

Surveys

Sixty-two surveys were sent out and 33 were returned. Of the 21 surveys sent to the state attorneys 10 were returned. Coincidentally, that was the same ratio sent and received from the public defenders. The officers returned 13 of the 20 sent out. The total return rate was 53.23%.

Two of the five questions on the survey could be easily quantified. The other

three questions were answered in narrative form and repetitive themes were extracted from the survey answers. Question number 1 varied slightly for each of the different surveys due to the differing perspective of the Exclusionary Rule. As can be seen in table 1, there is a low volume of cases dismissed by the various state attorneys throughout the state due to evidence being suppressed for violation of the Fourth amendment. The question posed to the state attorneys to answer was: "What is the estimated ratio of cases over the past three years have you had to dismiss due to evidence from searches being suppressed?"

Table 1: State Attorney estimate of cases dismissed.

Fraction of cases dismissed	States Attorney
less than 1%	4
1% to 3%	1
3% to 5%	5
More than 5%	0

Table 2 also shows that the number of cases caused to be dismissed due to the suppression of evidence is low. Question number 1 for the public defenders to answer was: "What is the estimated ratio of cases over the past three years you have had evidence from an improper search suppressed which led to a dismissal of charges?"

Table 2: Public Defender estimate of cases dismissed as a result of improper search.

Fraction of cases dismissed	Public Defenders
fewer than 1%	1
1% to 3%	3
3% to 5%	3
More than 5%	2*

Note*: one respondent stated 10% of cases dismissed for improper search.

Another question the officers were asked was: "Have you ever had evidence suppressed in a trial due to a judge ruling the evidence was obtained by an improper search and seizure?_____. If so, what was the outcome of the trial? (please check one)

a. dismissed?

b. continued, defendant found not-guilty?

c. continued, defendant found guilty?

The results of this survey question are seen in Table 3. Most of the officers had never had any evidence suppressed. Of the three that did have evidence suppressed, one respondent answered yes twice, one verdict was not guilty and one verdict was guilty.

Table 3: Responses of law enforcement officers to question about suppression of

evidence.

Case disposition	Number of cases
Not dismissed	10
trial continued - not guilty	1
trial continued - guilty	3

Question number 2 asked all survey participants, “Is there a point when public safety takes precedent over the rights of the individual by admitting evidence obtained due to a court interpreted error during a search and seizure? If so, when.”

A majority of the state attorneys answered yes to this question with the recurring theme being when the officer acts in good faith and the crime is very severe. Some examples such as murder, serial rape, and other serious crimes were mentioned. The public defenders were on the opposite end of the scale. All answered no or never to this question. One public defender was very adamant with the answer, “NO. See Czechoslovakia!” The surveyed officers’ main theme was public safety should take precedence over the individual right when the crime is violent and the 4th amendment violation is a “mere technicality.”

The third question, "The Fourth amendment gives us the right from unreasonable search and seizure and the "Exclusionary Rule" is a court interpretation of that amendment and not specifically stated in the amendment itself. Are there alternatives to the suppression of evidence which would still be viewed as constitutional?" had some interesting results.

The main alternative solution found in the state attorney’s surveys was for civil action against the officer and agency while allowing the evidence to be admitted for trial. Although, one state attorney believed the evidence should be suppressed and no alternatives exist. Again, the public defenders were unanimous in their stand for suppression and found no other recourse other then the Exclusionary Rule. One public defender sounded apologetic for the suppression of evidence. This public defender noted, “I agree this is a severe sanction and wish there was another.” However, no alternative was suggested. The officers had many alternatives but no common theme to the alternative other than the admittance of the evidence. Some of the alternative ideas were:

- Adjust the sentence according to the Fourth amendment violation
- Let the jury decide severity of 4th amendment violation as part of the deliberation process
- Totality of circumstances weighing by the judge
- partial suppression
- allow into trial if the evidence would have been found

The next question, number 4, contained multiple answers from most respondents and thus the number of answers is not consistent (see table 4). The question was, ”What do you believe is the most frequent reason for evidence being suppressed: (please check one)

a. Judicial error in law interpretation at:
    1. trial court level
    2. appellate court level

b. Prosecution error in preparation and/or presentation.

c. Officer error in:
    1. testimony
    2. report writing
    3. misunderstanding in search and seizure laws
    4. undertrained in search and seizure laws

d. Other

Overall, the states' attorneys stated the officers were the most frequent reason evidence was suppressed. Their main reason was misunderstanding in search and seizure laws, followed closely by officers being under trained in search and seizure laws. One prosecutor did place blame on prosecution error in preparation and/or presentation. Another state attorney did note the continually evolving search and seizure laws and different interpretations of the law are the main problem. There was an area of agreement between the public defenders and prosecutors on this question. The public defenders also blame the officers for the majority of suppressed evidence. One public defender stated the personal view of judges, due the specific interest in certain case material is a main cause. The officers made themselves the main cause stating misunderstanding in search and seizure laws and being under trained in search and seizure laws as the problems.Table 4: Summary of reasons for evidence suppression.

	Judicial error	Prosecutor error	Officer error
State Attorneys		Preparation or presentation - 1	Misunderstanding - 5 Training - 4 Officer error - 2 Testimony - 0 Report writing -0
Public Defenders	1 -trial court 1 - appellate court		Misunderstanding - 6 Training - 6 Officer error - 2 Testimony - 1 Report writing -1
Officers		preparation or presentation - 1	Report writing -2 Misunderstanding - 4 Training - 4 Officer error - 3 Testimony - 1

Note. multiple responses to some questions

The fifth and final question tried to elicit what changes they would like to see in the Exclusionary Rule. The question, "What, if any, changes need to be made concerning the Exclusionary Rule? was asked of all participants.

As before the state attorneys and public defenders were on different ends of the

spectrum. The state attorneys who responded want an expanded good faith exception; more "bright lines" instead of differing court interpretations; a cut off date for suppression motions; a balancing of 4th amendment violation versus seriousness of crime, and an integration of common sense and the law rather than technical jargon. On the other hand, the public defenders wanted to strengthen the rule, have the rule expanded, and have officers better educated on the rule itself. Some stated their belief that the hype about drugs has caused a hysteria regarding the Exclusionary Rule. One however, suggested the Exclusionary Rule should be abolished and let the finder of facts, the jury, hear all the evidence of the search, no harm - no foul. Another public defender noted on the bottom of the survey, "Please note that I am a registered and elected Republican not a Democrat or liberal." Officers tended to side with the state attorneys. Their changes included allow the evidence if no malice could be proven; let the jury decide based on the severity of the Fourth Amendment and the crime; more defined rule of search and seizure; more "good faith" exceptions; and rules to protect the victim not the criminal.

Interviews

In addition to the surveys, interviews were conducted with several people in the legal system. These included Judge Charles Miner, Florida First District Court of Appeals; Robyn Blumner, Executive Director Civil Liberties Union of Florida; Richard Friedman, Professor of Law University of Michigan; John Hearn, Police Legal Advisor, City of Coral Springs; Jeff Hockman, Police Legal Advisor, City of Ft. Lauderdale;

First District Court of Appeals Judge Charles Miner related that criminal cases are "fact specific" (Judge Charles Miner, personal communication, March 5, 1997)and therefore must be evaluated on its own facts. For that reason each case must be viewed as a separate incident causing the differing rulings on search and seizure cases. Judge Miner's opinion of why evidence gets suppressed are two primary reasons. First he stated, "there would be fewer suppressions if officers know how to testify and write reports." Secondly, he felt, "... most judges come from the corporate side of law and not criminal. Criminal cases must be based on the totality of circumstances." Judge Miner further stated "someone has to pay the price", when a Fourth amendment violation take place. However, Judge Miner also did not think the officer should be personally penalized for unintentional errors, "Why should anybody be penalized by a non intentional mistake." Finally, on the subject of alternatives, Judge Miner said, "Until I can see who the right person is to be held responsible, I would stay with the suppression of evidence."(Judge Charles Miner, personal communication, March 5, 1997)

Professor Richard Friedman, Professor of Law University of Michigan, stated that the idea of private action against the law enforcement officer has been previously discussed in criminal justice circles. His concern with that type of practice is, '..less than desirable persons in jail would have a hard time bringing action with or without an attorney. What would the damages be? How would the award, if any, be distributed?" (Professor Richard Friedman, May 14, 1997) Just as Judge Miner, Professor Friedman mentioned fact specific cases stating, "..cases are fact specific and courts have trouble applying general rules to specifics." Another concern of Professor Friedman was disregarding a violation of the Fourth amendment to prosecute someone. To him this type of system seemed like an oxymoron. He further was of the opinion that the use of

the Exclusionary Rule was more effective in protecting the rights of citizens than discipline by the agency or the court to officers who violated the Fourth amendment.

Robyn Blumner, Executive Director Civil Liberties Union (ACLU) of Florida, staunchly believed that the right of the individual is always superior, even to the safety of the public. She could not offer an alternative that she felt was, "..as fair and effective as the Exclusionary Rule." (Robyn Blumner, April 19, 1997) Her position with the ACLU did not give her the experience to comment on the rate of cases dismissed due to illegal searches and seizures. Ms. Blumner's opinion on why evidence gets suppressed was officer error in gathering, written reports, and testimony. It was also her opinion the officers misunderstand the rules of search and seizure which added to the reasons why evidence is suppressed. She articulated her thoughts about the need for sanctions against the police so they do not infringe on the rights of others. In addition, Ms. Blumner expressed her opinion that the suppression of evidence was "..the best way to insure police compliance with 4th amendment laws". She was genuinely concerned with the direction the court was taking by expanding the exceptions to the Exclusionary Rule and the new interpretations of what is a legal search. In particular she cited Whren v. United States (116 U.S. 1769) that reinstated the "could have" standard in vehicular stops and rejected the "would have" standard thus eliminating the premise that a stop as pretextual in nature for the purpose of finding contraband.

The interview with Jeff Hockman, Police Legal Advisor for the City of Ft. Lauderdale was conducted via telephone. Mr. Hockman did not think the Exclusionary Rule was a hindrance to the police. His reasoning was, "There are nine exceptions to the rule. The nine exceptions allow officers to search when necessary" (Jeff Hockman, August 13, 1997). Different cases display different fact patterns and the application of standards will differ from judicial circuit to judicial circuit and necessitates the need for the state supreme court to settle the dispute. He expressed that individual rights still needed to be protected as stated in the U.S. and Florida Constitutions and the only time public safety should take precedence over an individual's rights is during a natural or national emergency. But he did state that the suppression of evidence is a "judicial created remedy not specified in the 4th amendment". To this he further stated, " A constitution interpretation means what a panel of judges believes at a given point in time". (Jeff Hockman, August 13, 1997) Two alternatives to the Exclusionary Rule were suggested by Mr. Hockman. The suggestions were: 1) to somehow punish the agency and officer or: 2) to admit all evidence at trial and, if convicted, do not punish the defendant if there was a violation of the 4th amendment but let the criminal record note the defendant was guilty of the charge.

Another criminal justice professional interviewed was John Hearn, Police Legal Advisor for the City of Coral Springs. In his view of the public safety versus individual rights, Mr. Hearn favored public safety. He thought the public safety should always take precedence over the rights of the individual especially when the crime is of a violent nature. He further stated that sanctions against the agency through fines should be a penalty rather than the suppression of evidence. If the evidence is not admitted, "When all the facts are not known to the jury, it cannot fully use its collective common sense necessary to reach a knowledgeable decision." (John Hearn, August 19, 1997) Mr. Hearn's opinion of the reason evidence is most frequently suppressed was due to the

officer. He believes that officers often do not articulate the incident and fail to adequately detail in their written reports and testimony. They know what to do and when to do it. However, they do not know how to articulate why they choose a particular course of action. When the incident and officer action is not fully explained at the time of the incident, they become venerable to evidentiary attacks from the defense attorney. Mr. Hearn also believes that search and seizure laws are, "based on today's political environment" and are dependent on the make up of the state and federal bench. The Exclusionary Rule, in its current form, should be abolished according to Mr. Hearn. In its place should be a process that allows all the facts to be heard by the jury. Punishment for 4th amendment violations should be against the agency and, if malicious or repetitive, against the officer. Mr. Hearn summarized his philosophy under the Exclusionary Rule stating, "Under the Exclusionary Rule a murderer of a child can go free if the evidence is illegally obtained resulting in the victim's family becoming victimized yet again." (John Hearn, August 19, 1997)

Discussion

In order to discuss the results obtained through the surveys and the interviews, it is necessary to first review two very important sections of the U.S. and Florida Constitutions. The Fourth amendment of the U.S. Constitution provides, "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" (Bill of Rights, U.S. Constitution). This statement sets forth the sanctity of the private building whether a home or a business. It further mandates that the government must be prepared to demonstrate, to a third party, reasonable cause why a search and seizure is necessary. However, this amendment does not provide for any sanctions or penalties to the violator of this amendment.

Article I Section 12 of the Florida Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and against unreasonable interception of private communications by any means, shall not be violated. No warrants shall issue except upon probable cause, supported by affidavit particularly describing the place or places to be searched, and the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, *as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution* (emphasis added, Florida Constitution, adopted 1982)

Article I Section 12 of the Florida Constitution incorporates the language of the Fourth amendment of the U.S. Constitution and expands the protection under the Fourth amendment to include communications. In addition, and most significant, the Florida Constitution requires that information obtained be free from unreasonable search and

seizure and shall not be admissible into evidence if a decision of the U.S. Supreme Court would make the information inadmissible. Therefore, should the U.S. Supreme Court alter the interpretation of what is a lawful search and seizure the Florida Constitution would change consistent with that interpretation.

Since the Fourth amendment itself describes a prohibition without designating penalties, the violations for unreasonable searches and seizures were addressed by the U.S. Supreme Court. The Supreme Court interprets specific cases with specific facts with the Exclusionary Rule being the "punishment" against the government for unreasonable search and seizure. These cases that date from 1886 have been modified over the past 111 years depending on the make-up of the U.S. Supreme Court. The exceptions for the need for a warrant are constantly changing and the Court has modified these needs as recently as 1996 in Whren v. United States (116 U.S. 1769).

Acknowledging that the Exclusionary Rule is not part of the U.S. Constitution and the use of the Exclusionary Rule in Florida, as stated in its constitution, is dependent on the interpretations of the U.S. Supreme Court, then one must agree with Justice Black that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence that Congress might negate." (Wolf v. Colorado, 1949). Based on that premise, the results of the surveys and interviews will be discussed.

The surveys elicited interesting results. The first question on the surveys deal with the percentage of cases dismissed due to suppression of evidence. Both state attorneys and the public defenders responded with a low percentage of cases being dismissed due to the suppression of evidence (tables 1 and 2). Only two responses stating the suppressions were over 5%. Therefore the effect of the Exclusionary Rule on cases does not seem to be extensive. However, should the case be a violent crime or involve a celebrity, the Exclusionary Rule often becomes the focus of much debate. The notion that suppression of evidence is not a frequent factor in cases is also evident by the officers' as outlined in table 3. Seventy-one (71) percent of the responding officers survey never had evidence suppressed. Of the officers who had evidence suppressed, 75% stated the trial continued and the suspect was convicted. Only 25% of the officers surveyed had a case where the suspect was found not-guilty when the evidence was suppressed.

These results seem to be consistent with other studies. According to an unauthored press release by the American Civil Liberties Union, a 1978 study conducted by Comptrollers General of the United States in which 2,804 cases in 38 representative U.S. Attorneys Offices over a two month period indicated only .04% were declined by prosecutors because of Fourth amendment problems. In addition, only 1.3% of cases had evidence excluded at trial and over 50% of the few defendants whose suppression motions were granted in whole or part were convicted anyway. (Unauthored, ACLU press release, 1995, February 17). In the same press release the A.C.L.U. cites a study conducted in 1982 by the National Institute of Justice. In that study only 0.79% of all felony complaints brought in the state of California over a three year period were rejected by prosecutors because of the Exclusionary Rule (Unauthored, ACLU press release, 1995, February 17).

At first glance this would appear that the suppression of evidence affects a small percentage of convictions. These percentages may be skewed because many cases

are plea bargained to lesser charges because the prosecution does not want to introduce questionable evidence. A more reflective effect of the Exclusionary Rule might be the total percentage of cases dismissed or plea bargained due to evidentiary problems. The main problem however is that these statistics are not recorded and therefore are unavailable. Logic would dictate that the low percentage of dismissals discussed above would be higher if the total percentage of dismissals or plea bargained cases as a result of the Exclusionary Rule were available. Additionally, the true effect probably cannot be delineated statistically, but only on a case by case basis depending on the severity, notoriety, and political impact of the case.

Alternatives to the Exclusionary Rule were split between prosecution and defense lines. The public defenders staunchly supported the Exclusionary Rule and would not even discuss alternatives. Robyn Blumner firmly stated there was no alternative "... as fair and effective as the exclusionary rule" (Robyn Blumner, personal communication, April 19, 1997). Another public defender even cited the Florida Constitution as the "written in granite" reason why alternatives are impossible. However, as discussed previously the Florida Constitution is dependent on the decisions of the U. S. Supreme Court and susceptible to its interpretations.

On the other side, prosecutors and officers were more willing to look at alternatives. Most did believe sanctions were necessary and proper to protect rights. The difference was that they wanted the suspect to receive a penalty for the crime they committed. One interesting idea that was suggested by one public defender, one state attorney, and one officer was to allow all evidence into testimony and let the jury weigh the crime against the possible Fourth amendment violation. The jury then would review all the facts of the case and balance the severity of the alleged crime to the severity of the police's alleged grievous actions in collecting the evidence. The majority of the suggestions were to impose sanctions against the agency, officer or both. However, Judge Miner and Professor Friedman disagreed.

Judge Miner did not believe the officer should be held personally liable if the unreasonable search was done in good faith. Judge Miner stated, "Why should anybody be penalized by a non-intentional mistake" (Judge Charles Miner, personal communication, March 5, 1997). Professor Friedman was concerned with the ability of the suspect to receive compensation if the evidence was not suppressed and the suspect's only option was civil in nature. "...less than desirable persons in jail would have a hard time bringing action with or without an attorney. What would the damages be? How would the award, if any, be distributed?"(Professor Richard Friedman , personal communication, May 14, 1997). These are questions that would need to be answered prior to any alternatives being used.

The issue of victim's rights did arise. This point was most poignantly expressed by Mr. Hearn who stated, "Under the Exclusionary Rule a murderer of a child can go free if the evidence is illegally obtained resulting in the victim's family becomes victimized yet again." (John Hearn, personal communication, August 19, 1997) The victim and the victim's family have come to the forefront of discussion over the past few years. Many states, including Florida, have passed Victim's Rights legislation. Victims have the right to speak at sentencing hearings, seek restitution for medical expenses, and to be informed when the perpetrator is being released from jail. But, should the evidence be

suppressed and the guilty go free due to a Fourth amendment violation, the victim has no recourse other than a possible civil action. Should the suspect not be in a high income bracket, the civil action becomes mute.

Another view is that the Exclusionary Rule is not a defendant versus victim issue. As Justice Traynor describes it, "The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward" (LaFave, 1978). This statement forgets the "wrong" done to the victim. It places the focus on the defendant and the officer, but not the victim of the crime. The clash between the rights of the accused versus the rights of the victim still rages in the legal, moral, and ethical arenas. As long as there is a perception that the accused has more rights than the victims, this issue will remain a topic of intense discussion.

The survey also revealed the officer is believed to be the most frequent reason why evidence gets suppressed (table 4). An overwhelming majority, 91% of the answers, expressed that officers through errors in testimony and report writing, misunderstanding of search and seizure laws, or being undertrained in search and seizure caused evidence to be suppressed. Surprisingly, the state attorneys and public defenders stated they may be the reason for evidence being suppressed. Only one officer thought someone else other than officers were the main reason evidence was suppressed. The survey results indicate 4.4% thought errors in officer testimony was the cause of suppression. Errors in report writing accounted for 6.7% of the answers. Misunderstanding of search and seizure law by officers was regarded by 33.3% of the respondents as the main cause for evidence being suppressed. Thirty-One (31) percent pointed to being undertrained as the reason for suppression of evidence. These results seem to indicate a lack of working knowledge of search and seizure laws by officers. Are the officers undertrained or are the dynamics of search and seizure laws such that an officer cannot gain a full understanding of the ever-changing court interpretations to properly apply them in stressful and sometimes life threatening situations? Most likely, the answer is an intersection of both.

In Florida, the state mandates 804 hours of training for certification as a police officer. That training is divided into three blocks of legal training totaling 105.5 hours. The exact mandated hours for each legal subject is not specified and left up to the particular regional academy. The legal blocks include constitutional law, elements of specific crimes, the history and evolution of laws, ethics, and traffic laws, etc. (Florida Police Officer State Curriculum Guidelines, revision 9/95). In Broward County, recruits receive four hours of constitutional overview, eight hours of search and seizure, and three hours of laws of arrest. Of the 105.5 mandated hours, Broward County recruits receive 15 hours (14%) of training in legal issues pertaining to search and seizure. A new officer is then placed into the field with limited knowledge of search and seizure laws while the interpretation of admissibility of evidence is constantly changing. Even the veteran officer does not usually have an extensive knowledge of search and seizure laws.

A look at the court system will also help illustrate this point. Although a small minority of cases travel the full route to the United States Supreme Court, the possibility is always present. As we walk through the suppression hearing and subsequent appeals, note the number of judges within the process. When a officer makes an

arrest, the evidence is subject to a suppression hearing (1 judge). Should the evidence be suppressed it may be appealed to the District Court of Appeals (3 to 5 judges)by either the state or the defense. The next step is the Florida Supreme Court (7 judges). And the final stop is the United States Supreme Court (9 judges). In all, a minimum of 19 judges have reviewed the facts and applied their individual interpretation of the Fourth amendment to a specific set of facts and circumstances. The decisions by the different courts are seldom unanimous and the dissenters state their own opinions of their interpretation on how they apply to a specific set of facts. Thus, even after time, research, and the knowledge of all these judges, they can't decide unanimously if the officer operated within the confines of the Fourth amendment. If these judges cannot decide if the application of search and seizure laws practiced by the officer are correct or not, how can we expect an officer with 15 hours of training to be correct 100% of the time? Because if the officer is not right, the defendant often goes free.

Taking a combined look at these two premises it should become clear that the officer is at a disadvantage. Professor Oaks wrote, "The deterrent effectiveness of the exclusionary rule is also dependent upon whether the arrest and search and seizure rules that it is supposed to enforce are stated with sufficient clarity that they can be understood and followed by the common ordinary police officer." He continues stating "Though undoubtedly clear in some areas of police behavior, the rules are notoriously complex in others" (LaFave, 1978). Although Professor Oaks did not question the need for the Exclusionary Rule, he does bring out a valid point. There are some bright-line rules officers can follow. However, the complexities and nuances are even troubling to the court. This is evident by split decisions by the courts and inconsistencies in case law.

Technology is an example of the complexities and nuances that have presented the police, lawyers and the courts with new challenges. Since the penalties for violation of the 4th amendment are court interpreted, how do you interpret the search of a pager's display? The pager issue has been addressed in several court decisions but the interpretation can vary from court to court. In U.S. v. Diaz-Lizaraza, (981 F.2nd 1216) the court found that accessing messages transmitted to a pager by activating the pager itself not to be an interception of communications because the transmission of the communication ended when the pager receives the communication. In addition, as stated to Lisa A. Regini, F.B.I. Special Agent, "Upon lawful seizing a pager incident to arrest, an officer must realize the retrieval of alphanumeric or voice messages is not an interception of a communication, as defined in the federal electronic surveillance statute."(F.B.I. Law Enforcement Bulletin, 28-31 1997, January).

However, technology changes rapidly and the court decides if a search was legal or not only after the incident is over. Therefore, the Exclusionary Rule, by definition "...operates only after the incriminating evidence has been found" (LaFave, 1978). What guidelines do the police follow when facing new technology? They can rely on court precedence and use their best judgment. But as stated in Elkins v. United States (364 U.S. 206) "The rule is calculated to prevent, not to repair." Thus, the officer must act on past practices when what is searched and how it is being searched may have no prior court attention and no bright-line to base their actions on. Each case is based on different facts despite similarities. The application of an interpretation is difficult as Professor Friedman states, "...cases are fact specific and courts have trouble applying

general rules to specifics" (Professor Richard Friedman, personal communication, May 14, 1997).

As previously stated, the inconsistencies in interpretations cause confusion and illustrate how the interpretation varies depending on the worldview of the justices who are seated on the Court at the time of the case review. A recent change can be found in reviewing Kehow v. State (521 So.2nd 1094, Fla. 1988), State v. Daniel (State v. Daniel., 665 So.2d 1040 Fla. 2d DCA (1995, State v. Ogburn (483 So.2d 500, Fla. 3d DCA 1986) and Whren v. United States (116 U.S. 1769). In Ogburn the Court ruled that a stop was legal based on whether the officer, despite ulterior motive, **could have** effected the stop anyway because of a minor violation. In Kehow the law was changed by the Court to require a showing that a reasonable officer **would have** made the stop under existing facts and circumstances. Adopting this standard in Daniel the Court indicated that a stop for a minor infraction was not pretextual if the officer was acting within the proper scope of lawful authority and the record contains competent substantial evidence that the stop was not **objectively pretextual** without regard to any subjective intentions as demonstrated by usual police practice.

Then in 1996 the U.S. Supreme Court in Whren changed that interpretation ruling when in writing the opinion Justice Scallia said, "There is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." (Whren v. United States, 116 U.S. 1769) The Courts positions was because the officers had probable cause to believe the defendants violated a traffic law rendered the stop reasonable under the 4th amendment. Once again the standard is **could have** stopped, a full circle has been reached through the evolution of different interpretations of the 4th amendment as applied to an officer's action. Other cases have also followed the footsteps of change dependent on the conservative or liberal make up of the Court at the time of the decision. This trend will continue and more inconsistencies and "flip flop" interpretations in what was, what is, and what is again legal will keep all criminal justice practitioners vying for the correct answers.

Conclusion

The Exclusionary Rule is a complex issue which fosters emotion from both critics and proponents. The plethora of search and seizure landmark cases are impressive. The list consists of such cases as:

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

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)

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

Olmstead v. United States, 277 U.S. 438 (1928)

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

Chimel v. California, 395 U.S. 752 (1969)

California v. Greenwood, 486 U.S. 108 (1988)

Terry v. Ohio, 392 U.S. 88 (1968)

Maryland v. Wilson, 117 Sct. 882 (1997)

The issues in these cases are a common theme. Did the police through their actions violate the defendant's Fourth amendment rights and if so, should the evidence be suppressed? This question is asked in courtrooms in every state in the union every day. The answer is not a simple one nor is it consistent. Not only do states vary in interpretations, but districts within states differ. The United States Supreme Court's decision is the law of the land and one of their functions is to create legal standards when states differ in constitutional interpretations. However, the U.S. Supreme Court is often divided in its opinions and their opinions may reverse a prior Court's decision due to the worldview of the majority seated at any specific time.

The Exclusionary Rule is a by-product of this conflict between how lower court judges or the Supreme Court Justices interpret a specific set of facts. The results of the survey illustrate the complexity of the Exclusionary Rule, its effects on criminal justice professionals and the system itself. The analysis of the Fourth amendment points out the lack of provisions for penalties for violating the mandates set forth in the amendment. Since what is "unreasonable" is not defined in the Fourth Amendment, the Court has the virtually unbridled discretion to interpret specific case facts and how they believe the facts pertain to search and seizure laws. In doing so, the Court can change what is or is not subject to suppression and therefore strengthen, weaken, or change the Exclusionary Rule.

The focus of this paper was to review the viability of the Exclusionary Rule in today's environment and seek constitutional alternatives to suppression of evidence. Since its inception, the rule has seen a metamorphosis through differing Court interpretations. These changes to the judicially created sanction of suppressing evidence may in time evolve to alternatives to suppression or Congress may legislate alternatives. This country was founded on freedom and the individual person's rights as guaranteed in the Constitution. The conflict between the public's safety and the rights of an individual alleged to have committed a crime will continue to be passionately debated. The Exclusionary Rule will have a prominent role in that debate.

Although the above research indicates the vast majority of perpetrators do not avoid a guilty verdict as a direct result of the Exclusionary Rule, the following two questions remain in the forefront: 1) How instrumental is the Exclusionary Rule in causing the prosecution to accept or initiate a plea bargaining agreement? 2) Should a violent criminal benefit from the Exclusionary Rule and be released back into society because the police discovered incriminating evidence by conducting an unreasonable search and seizure regardless of the extent of the unreasonableness?

The exclusion of evidence from the ears, eyes, and consideration of a jury does not allow them to evaluate all the facts of a case. This exclusion can, and does allow nonviolent and violent criminals to receive lesser sentences, go free, or never even see a court room to answer for their crimes. They are back in society often to victimize others again. Society has institutionalized the punishment of those who victimize others through the police and the courts. Perhaps, after 111 years, the Exclusionary Rule has become such a part of that institution we are unable to consider new, yet constitutional means to ensure the Fourth Amendment is protected without sacrificing the public safety. Like so many other institutionalized systems and procedures, the Exclusionary Rule will remain

entrenched as long as the Supreme Court and Congress refuse to expand the horizon and legitimately consider constitutional alternatives to the suppression of evidence.

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