Florida Law Review

Volume 68 | Issue 4 Article 4

July 2016

Corporate Criminal Prosecutions and the Exclusionary Rule

Robert E. Wagner

CORPORATE CRIMINAL PROSECUTIONS AND THE EXCLUSIONARY RULE

Robert E. Wagner[*]

Abstract

For well over half a century, the legal system has chosen to exclude some of the most probative evidence possible from criminal trials when the government obtained the evidence in contravention of the Fourth Amendment. This policy of exclusion is based more on a perceived greater need to protect U.S. citizens from governmental abuses than to convict every criminal. Meanwhile, during the same time period in which courts have excluded this evidence, the government has consistently increased the level of criminal enforcement against corporations. The government regularly promotes the idea that corporations are dangerous if left unchecked, and as a result a strong need for criminal prosecutions, new laws, and increased penalties exists. Therefore, on the one hand, the government has increased its pursuit of criminal corporations, and on the other hand, courts exclude from prosecutions the evidence most likely to lead to convictions.

This Article examines the possible tension between these two policies. The examination begins with an overview of the ways in which the law treats corporations as "people" in court and entitles them to constitutional rights. It continues with the ways in which corporate criminal prosecutions have arisen and the ways in which courts currently conduct them. This Article then studies the so-called exclusionary rule and its origins as a judicial doctrine that seeks to protect the rights granted under the Fourth Amendment. This Article's argument demonstrates that corporations may not be entitled to Fourth Amendment protection at all even though they currently receive it. As part of its analysis, this Article examines both the contemporary explanations and historical backdrop for the exclusionary rule. None of the traditional justifications for the exclusionary rule apply effectively to corporations. When it comes to deterrence, the costs of excluding reliable information are higher in the corporate setting than the individual setting, and the benefits are lower. This Article operates within the U.S. Supreme Court's requirement that a court must conduct fact-specific cost–benefit analysis in every case to determine whether to exclude evidence, and this Article concludes that in

* Assistant Professor of Law, CUNY Baruch College Zicklin School of Business Department of Law; M.B.A., University of Chicago Booth School of Business; J.D., Cornell Law School. I would like to thank the participants of the CUNY Baruch College Zicklin School of Business Department of Law Faculty Workshop as well as Marc Edelman, Matthew Edwards, Seth Lipner, Irina Manta, Sandra Mullings, Jennifer Pacella, Nizan Packin, David Rosenberg, Erin Sheley, Valerie Watnick, and Jay Weiser. I am also grateful to the CUNY Baruch College Zicklin School of Business Department of Law and its staff for support during my research.

the vast majority of corporate criminal cases, the exclusionary rule should not apply. This Article proposes that courts should adopt a default rule that all reliable evidence should be admitted against corporate defendants regardless of its provenance.

INTRODUCTION

The Fourth Amendment of the U.S. Constitution establishes for all Americans the right to be secure in their persons and property from unreasonable searches and seizures.[1] One of the primary ways in which this right is protected today is via the so-called exclusionary rule. This rule establishes that when the government has obtained evidence in an unconstitutional manner, a court will not allow the evidence to establish the guilt of or infringe upon the rights of an individual.[2] This Article argues that the exclusionary rule should not apply with equal force to corporations as to natural people. In making this argument, this Article examines the distinctions between natural people and corporations, including information relating to corporate recidivism rates and the inherent limitations of corporate criminal penalties. This Article studies the history of both the Fourth Amendment itself and of the exclusionary rule, as well as the U.S. Supreme Court's jurisprudence in that area. The

1. U.S. CONST. amend. IV.
2. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914).

conclusion of this analysis is that the unique characteristics of a corporation and the different costs and benefits of excluding illegally obtained evidence from corporate prosecutions indicate that courts should not apply the rule in the traditional manner in these settings. This Article specifically argues that courts should allow reliable but unconstitutionally obtained evidence in criminal prosecutions against corporations. Meanwhile, courts should not use this same evidence against natural people also prosecuted in connection with the same criminal activity. Further, courts should allow corporations to pursue any non-exclusion-based remedy available for the constitutional infringement.

In Part I, this Article discusses the origins of and tensions inherent in corporate criminal liability. The relatively recent nature of this form of liability and the fictional nature of the corporation lead to special challenges when courts try to fit the doctrine into the general criminal law, including when they have to answer the question of whether to admit "tainted" evidence. This Part addresses the goals behind corporate prosecution and how best to accomplish them. Part II focuses on the exclusionary rule itself, its history, and the arguments for and against its use. Part III examines the applicability of the exclusionary rule in the corporate setting and concludes that while the Fourth Amendment applies to corporations, the exclusionary rule need not have the same application. This Part examines both the goal of deterrence, which courts have recognized to be the key purpose of the exclusionary rule, and other historical rationales for the rule to show that all of them support only a narrow application of the rule in the corporate setting. The conclusion of this Part presents a proposal to have a default prohibition against use of the exclusionary rule in the corporate setting if the government obtained reliable evidence in violation of the Fourth Amendment.

I. CORPORATE CRIMINAL LIABILITY

This Part begins by exploring the origins of corporate criminal liability and the tensions inherent in the concept. It then examines the special challenges that the concept of corporate personhood create. Finally, this Part considers the purpose of corporate criminal liability and investigates how best to achieve the goals associated with corporate criminal liability.

A. *The Framework of Corporate Criminal Liability*

Over a century ago, the debate began on both the existence and appropriate level of corporate criminal liability.[3] Corporations were not

3. *See* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 415 (2012); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478 & n.2 (1996).

originally subject to the criminal law.[4] Perhaps one of the most respected early legal scholars, William Blackstone, believed that the correctness of this state of affairs was so clear that it did not need to be elaborated upon.[5] In 1701, American courts addressed the question and held that only individuals could be charged criminally.[6] Eventually, in the early part of the twentieth century, the U.S. Supreme Court finally established corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*[7] and used the respondeat superior principle to determine guilt.[8] A court can now hold a corporation criminally liable for almost any crime, except those requiring commission by a natural person,[9] such as rape.[10] Establishing that a court can hold a corporation criminally liable, however, did not end the debate. In fact, the issue may be more contentious today than ever before. The opponents of corporate criminal liability perceive the practice as an "inefficient relic" that can better achieve its goals in the civil system or, even worse, as a useless overreaction from an ignorant society.[11] Others think that more corporate prosecutions would be appropriate, as evidenced by the Department of Justice's increased focus on corporate crime.[12]

Neither side of the debate claims that there has been no harm, but there is disagreement regarding who is responsible and who should suffer the consequences. What does it even mean to say that a corporation has committed a wrong? One possibility, which many have adopted, is to ask if someone with a high level of decision-making authority in the

4. *See* Khanna, *supra* note 3, at 1479.

5. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (stating William Blackstone's opinion that "[a] corporation cannot commit treason, or felony, or other crime" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *476)).

6. Kathleen F. Brickey, *Corporate Liability*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 600, 601–02 (Gerben Bruinsma & David Weisburd eds., 2014).

7. 212 U.S. 481, 492–95 (1909). For a discussion of the case, see Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 230–32 (2012).

8. *N.Y. Cent.*, 212 U.S. at 494 (imposing penalties on the corporation for an act committed by an employee on the premises).

9. A court has defined a natural person as "[a] human being, as distinguished from an artificial person created by law." Utica Mut. Ins. Co. v. Precedent Cos., 782 N.E.2d 470, 476–77 (Ind. Ct. App. 2003) (quoting *Natural Person*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

10. Khanna, *supra* note 3, at 1488.

11. Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 5 (2012) (footnote omitted).

12. *See* David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1309 (2013) (discussing the widely circulated Holder Memo, a guidebook for corporate liability).

corporation has done so.[13] Shareholders have very little say in the management of their corporation while the true decision-making authority rests with the board, and other corporate officials accomplish most of the tactical day-to-day management.[14] Therefore, opponents of corporate criminal liability argue that it would be appropriate to hold either the managers or employees liable for any criminal conduct, but not the entire corporation; they argue that it is unfair to punish the shareholders by imposing criminal penalties on the whole entity when only a small part may have engaged in wrongdoing.[15] This point of view leads to the sentiment that people are the ones who commit crimes, not corporations.[16] Thus, innocent shareholders and employees become "collateral damage" when courts impose criminal liability.[17]

This was one of the main points raised in *New York Central* when the defendants argued that one punishes innocent shareholders when one punishes the corporation and that it was impossible for the corporation as an entity to commit a crime because the board (who is ultimately responsible for the decisions of a corporation) could not legally authorize criminal acts.[18] This was not an unusual position because the idea that a corporation could not possess the moral blameworthiness necessary to perpetrate an intentional crime was a long-held belief.[19] The Supreme Court rejected this position when it held that the purposes, motives, and intents of a corporation's agents are also those of the corporation.[20] Thus, the court established the tort law liability framework of respondeat superior as a viable criminal law theory. Yet, this new criminal application of an established tort principle quickly came under attack.[21] Many people felt that its use was inconsistent with the purpose of criminal law (namely the punishment of those who are morally blameworthy) because it does not rely on personal fault but instead is based upon vicarious guilt.[22] Critics also attacked the use of respondeat superior to establish corporate criminal liability on the grounds that it was "overly

13. *See, e.g.*, Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986).

14. Carol R. Goforth, "*A Corporation Has No Soul"—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 629–30 (2010).

15. *See* Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19. J.L. & POL'Y 1, 5–6 (2010).

16. Brickey, *supra* note 6, at 601.

17. Alschuler, *supra* note 5, at 1359.

18. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909).

19. *See* Pamela H. Bucy, *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 259, 259 (Joshua Dressler ed., 2d ed. 2002).

20. *N.Y. Cent.*, 212 U.S. at 492–93 (quoting 1 BISHOP'S NEW CRIMINAL LAW § 417 (1892)).

21. *See* Khanna, *supra* note 3, at 1484.

22. *Id.* at 1484–85 (footnote omitted).

broad."[23] For example, it is possible in both the federal and state systems for a court to hold a corporation liable for the actions of any employee, even if the corporation instructed the employee specifically not to perform the action or even if the corporation was a victim.[24] In fact, some corporate convictions do seem to have been based on individual actions, which results in disastrous results for the corporation, its employees, shareholders, and other stakeholders who were also adversely affected.[25] For example, the collapse of Arthur Andersen resulted in the loss of 85,000 jobs and untold difficulties for not only those employees but also for people who relied on those employees or the services the company had provided and whose injuries the company did not rectify even though a court later reversed the conviction.[26]

Multiple scholars argue that corporate criminal liability is unnecessary and in fact can lead to corporations spending more money avoiding crime than they should, which results in so-called overdeterrence.[27] Nonetheless, while corporations are almost unquestionably an essential part of modern life and bring many advantages, they also have the ability to cause great harm.[28] A corporation can have as much coercive power as a government and occasionally even more.[29] Large modern corporations are very similar to sovereignties; they often have more economic power than nations, they form alliances and partnerships with foreign nations, and some go so far as to have their own security forces.[30]

In fact, corporations are without a doubt one of the most powerful institutions in the world. Governments are the only other possible contender for the most powerful institution, and in many situations corporations are more powerful than governments.[31] Corporations have taken actions that have contributed to, if not caused, many types of disasters.[32] Corporations can commit significantly larger and more

23. Sheley, *supra* note 7, at 228, 236.

24. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406–07 (4th Cir. 1985).

25. Alschuler, *supra* note 5, at 1367 ("The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.").

26. Alschuler, *supra* note 5, at 1364–66.

27. *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996).

28. *See, e.g.*, Gilchrist, *supra* note 11, at 3–4 (discussing the BP Gulf disaster as an exceptional instance of harmful corporate conduct).

29. Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 891 (2011).

30. *Id.* at 949–50.

31. Goforth, *supra* note 14, at 618.

32. Susanna K. Ripken, *Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 119 (2009).

damaging crimes because of their complexity, resources, and size.[33] Some of this increased harm is due to the "collective qualities" of corporations that amplify the potential harm caused.[34] Criminalizing corporate behavior may also be appropriate due not only to the large amount of harm that corporations can cause, but also the specific chances for unlawful behavior that arise from corporations' organizational structures.[35] Some scholars also refer to the expressive value of punishing corporations and argue that because of societal perceptions, if the government fails to punish corporations, the criminal law may seem less legitimate.[36] One view of the issue is that only individuals can bear moral responsibility,[37] while another is that if a corporation fosters a culture that supports wrongdoing, then courts can and should use any actions by employees that result from its internal decision-making process to establish the corporation's responsibility.[38]

Some jurists conceive of corporations as mere legal fictions referring to those people and agreements that make up the organization; therefore, any liability should attach to these individuals.[39] At the same time, this model of the corporation has received objections on numerous grounds, one of them being that corporations have cultures that are different from those of the individuals in them.[40] Another problem with imposing criminal liability only upon the individuals is that, due to the nature of a large corporation and the possible complexity of its various hierarchies, determining which individual may have violated the law can be difficult, if not impossible.[41]

Furthermore, the individuals alone may not be perpetrating, or at least not orchestrating, the criminal behavior; rather, it may be an actual business strategy or a simple standard operating procedure that creates the criminal behavior.[42] Furthermore, a corporation's customs or even its

33. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009).

34. Sheley, *supra* note 7, at 228.

35. Joseph F.C. Dimento et al., *Corporate Criminal Liability: A Bibliography*, 28 W. ST. U. L. REV. 1, 2 (2001).

36. Sheley, *supra* note 7, at 227.

37. C. Soares, *Corporate Versus Individual Moral Responsibility*, 46 J. BUS. ETHICS 143, 143 (2003).

38. John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 LOY. U. CHI. L.J. 507, 508 (2008).

39. Gilchrist, *supra* note 11, at 15.

40. *See id.* at 16.

41. Brickey, *supra* note 6, at 608–09.

42. *See, e.g.*, Beale, *supra* note 33, at 1484 (discussing the engineering giant Siemens' systemic use of bribes as one instance of when the corporation and not an individual committed a crime).

culture can affect a person's behavior and attitudes.[43] If the legal system attributes the criminal behavior of corporations to the individual alone, it may disregard the institutional processes occurring within the organization that may have at least contributed to, if not caused, the criminal behavior.[44] There are many relevant ways that corporate culture and organizational structure can influence individual decision-making.[45] It has been known for many years that a corporation's policies can encourage criminal behavior.[46] A notorious example of corporate misconduct inextricably tied to the character and culture of the corporation was the tobacco companies' longstanding pattern of fraudulently misleading regulators and the public about the obvious and known health risks involved in smoking.[47] In these types of situations, the proper question to ask is: What was it about that organization that caused people to act that way?[48]

Another argument that scholars use to justify corporate criminal liability is that it allows the community to express its moral judgment.[49] If the government does not hold corporations criminally liable when people think it should, it is possible that it would weaken the criminal justice system because of appearances of favoritism and unequal application of the law.[50] Perception could exacerbate this effect because people reportedly experience a heightened sense of moral indignation when dealing with a corporation than they do for a natural person, even when dealing with the same crime.[51] Hence, there would be a situation in which people feel that the criminal justice system is functioning below the norm when it should actually function at a higher level than the norm.[52] A final argument in favor of corporate criminal liability is

43. Ripken, *supra* note 32, at 103.

44. Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It's All About Power*, 41 STETSON L. REV. 97, 110 (2011).

45. *See* Goforth, *supra* note 14, at 634.

46. *See* MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 58 (2006).

47. *See* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387, 387–88 (1999).

48. Goforth, *supra* note 14, at 648 (quoting James A. Waters, *Catch 20.5: Corporate Morality as an Organizational Phenomenon*, ORGANIZATIONAL DYNAMICS, Spring 1978, at 5 (emphasis omitted)).

49. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009).

50. Gilchrist, *supra* note 11, at 51.

51. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618 n.42 (1998) (emphasis added); *see* Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 792 ("People often search for group rather than individual-level causes for extremely negative events.").

52. *See* Gilchrist, *supra* note 11, at 52.

seemingly counter-intuitively for the protection of corporations, or at least for the protection of law-abiding corporations. In many circumstances, corporations that disregard the law have a competitive advantage over corporations that follow the law.[53] The criminal justice system would place these law-abiding corporations at an even greater disadvantage if criminal sanctions did not exist.

The availability of civil corrective measures further complicates the appropriateness of criminal sanctions. It is possible that corporate misconduct could be controlled through civil enforcement, but it is also possible that this would be ineffective because civil fines cannot replicate the reputational harm of criminal sanctions.[54] At the same time, this reputational damage stemming from criminal convictions is also problematic. The unpredictability associated with reputational damage may be advantageous,[55] and yet, the general nature of reputational damage and the seeming inconsistency could lessen this advantage.[56] While there remain many objections and detractors, the supporters of corporate criminal sanctions currently outnumber their opponents.[57] The jurists who favor corporate criminal liability do also argue, however, that the legal system should simplify the prosecution of corporations.[58] To understand this part of the debate, it is helpful to examine the nature of the corporation in the eyes of the law.

B. *Corporations and Personhood*

It is generally acknowledged that the corporate structure is needed in a modern business world, and the pooled resources at their command has been the source of most, if not all, great enterprises.[59] Given this fact, it is important to understand how society generally views corporations. Scholars and commentators realized almost a hundred years ago that juries are more likely to find corporations guilty than they are to find individuals guilty.[60] This willingness to attribute guilt to a corporation is unlikely to arise from corporations all being malevolent. As it happens,

53. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005).

54. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 512–16 (2006).

55. *See id.* at 514.

56. Gilchrist, *supra* note 11, at 38.

57. *See* Sean Bajkowski & Kimberly R. Thompson, *Corporate Criminal Liability*, 34 AM. CRIM. L. REV. 445, 445 (1997).

58. *See, e.g.*, Beale, *supra* note 33, at 1481–82.

59. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 625 (1990) (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).

60. *See* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 834–35 (1927).

many early corporations were explicitly benevolent institutions, including several new church congregations.[61] Indeed, many different types of organizations are formed as corporations, ranging from churches to the Guardian Angels (self-appointed public protectors) and even to the Ku Klux Klan.[62] Furthermore, one must remember that most corporations are small: Of the three million businesses that belong to the U.S. Chamber of Commerce, more than ninety-five percent have fewer than 100 employees, and of all federally taxed corporations, more than seventy-five percent have less than one million dollars in receipts reported per year.[63] Regardless of the variety of types of corporations, the fact remains that a lot of individuals view them with skepticism or downright hostility. Many people have concerned themselves with protecting democracy from the corruptive and often distorting effect of massive amounts of money collected through the corporate structure.[64] This fear of corporations led to a number of people referring to them as "soulless," and some—such as President Thomas Jefferson—fearing that they "would subvert the Republic."[65] This fear is based at least partly on the claim that if corporations have the same constitutional rights but increased power, the result is clearly the supremacy of the corporate form over the natural form of personhood.[66] Nevertheless, this fear or dislike of corporations is far from universal, and many scholars maintain that while it may be true that corporations have been given too much power, that does not mean they are "bad."[67]

Whether corporations have been given too much power is easier to answer by looking at how society does and should think of corporations generally, from both theoretical and historical perspectives. Historically, at different points, America's corporations and England's have had limited constitutional protections when compared with individuals.[68] In American history, corporations did not have a significant role in the Constitution. Justice John Paul Stevens pointed out that the Framers did not find it difficult to distinguish a corporation from a human.[69] The Constitution does not name corporations.[70] In fact, only four states (Connecticut, Pennsylvania, Massachusetts, and Vermont) mention

61. *See* Goforth, *supra* note 14, at 625.

62. Miller, *supra* note 29, at 906.

63. Citizens United v. FEC, 558 U.S. 310, 354 (2010).

64. Miller, *supra* note 29, at 896 (quoting McConnell v. FEC, 240 U.S. 93, 205 (2003)).

65. *Citizens United*, 558 U.S. at 427 (Stevens, J., concurring in part and dissenting in part).

66. Mayer, *supra* note 59, at 658.

67. *See, e.g.*, Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 734 (2013).

68. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 204–05 (1946).

69. *Citizens United*, 558 U.S. at 428.

70. Mayer, *supra* note 59, at 579.

corporations in their original constitutions,[71] and in situations in which state constitutions did award specific rights to corporations, these were different than those given to individuals.[72]

Jurists have disputed whether the corporation is an entity beyond the people involved and its legal status.[73] Early on in this dispute, Chief Justice John Marshall described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . ."[74] For example, a corporation is not allowed to conduct business beyond the scope of its charter.[75] In its most recent description of the corporate entity, the Court stated:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[76]

In line with this theory, while it is appropriate for courts to protect corporations from unlawful investigations, they are not equal with people in terms of a right to privacy.[77] Justice Stevens pointed out that even though corporations have made many significant contributions to society, they are not members of society.[78]

At various times, the Court has specifically expressed the belief that individuals and corporations have many important and apparent differences.[79] In part because of the idea that corporations derive their existence and hence all privileges from the state, courts have limited their rights.[80] For example, at one point, a Supreme Court Justice pointed out that if a law enforcement agency was simply "curious" about a

71. Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 239–40 (2011).

72. *Id.* at 241.

73. Ripken, *supra* note 32, at 100.

74. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

75. *See* Hale v. Henkel, 201 U.S. 43, 74–75 (1906), *overruled in part by* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

76. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

77. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citation omitted).

78. Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part).

79. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 105 (1988).

80. *See id.*

corporation, it would have the legitimate right to satisfy that curiosity by conducting investigations.[81] The only significant limitations were that the curiosity had to deal with subject matter in the domain of particular agencies, the information requested was not too indefinite, and the information was reasonably relevant.[82]

The decision in *Santa Clara County v. Southern Pacific Railroad Co.*[83] showed another view, from an early Supreme Court, that a corporation has rights and duties conferred upon it stemming from the rights and duties of its human members.[84] Today, it is established that courts treat corporations in many ways as though they are natural people. For example, not only can corporations be held responsible for criminal actions, they can also be parties to contracts, own property in their own name, sue others in court, and be sued by others in court.[85] This does not mean, however, that the law should always treat them the same as natural persons. Furthermore, most would agree that a paramount goal in the law is that it should treat actors differently if they are in fact different but should treat them the same if they are significantly similar.[86] From a constitutional perspective, treating entities that clearly differ the same as one another is just as large an error as treating those that are the same differently.[87]

At their root, corporations exist because some endeavors require joint efforts and can only be achieved with many individuals participating.[88] If the activities of large numbers of people are properly coordinated, the result can be far superior to the sum of what the individuals contributed.[89] One of the challenges that has arisen as a result, however, has been to define this new collective entity and answer whether it is a "person." The Supreme Court declared in 1886 that a corporation is a person for at least some constitutional purposes.[90] Yet, there are some basic differences between a "natural" person and a corporation. As Justice Stevens pointed out, corporations have several attributes that increase their ability to raise capital and use that capital in ways that maximize investors' returns; these

81. *Morton Salt*, 338 U.S. at 652.

82. *Id.* at 652–53.

83. 118 U.S. 394 (1886).

84. *Id.* at 396.

85. Brickey, *supra* note 6, at 601.

86. H.L.A. HART, THE CONCEPT OF LAWS 155 (1961).

87. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 35 (1986) (Stevens, J., dissenting).

88. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 264 (1999).

89. *Id.*

90. Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886); Mayer, *supra* note 59, at 581.

attributes include limited liability, the separation of control from ownership, possible unending life, and favorable legal treatment of both the accumulation of assets by the corporation and the eventual distribution of those assets.[91] Recently, Justice Ruth Bader Ginsburg agreed with Justice Stevens that corporations do not have a conscience, belief, feelings, thoughts, or desires.[92] There are at least three different ways that the law can view a corporation as a person: a moral person, a natural person, and a legal person.[93] There is no doubt a corporation is not a natural person, nor is there any doubt that a corporation is a legal person; furthermore, one could argue that a corporation is also a moral person, and it is therefore appropriate to hold it morally accountable.[94]

Scholars claim that because corporations are not humans or citizens, and in fact are just tools to human ends, society has no need to honor any claim of autonomy unless that autonomy is itself useful for humans.[95] Further evidence against a corporation's personhood claim is that corporations can only decide, act, or intend anything through the human members of the corporation; without them, the corporation could not function or even have an identity.[96] Nevertheless, this view of the corporation as an extension of the humans involved is belied by the fact that even if every human involved has died, the same corporation can live for several generations without changing.[97] Another view of corporations, which contains a stronger link to personhood, is that each of them is unique and has its own personality, character, and mens rea that are social realities that the American people understand.[98] When such corporations behave in a manner inconsistent with valuing human worth, they send a message that can only be corrected by the condemnation and power inherent in criminal prosecutions.[99] After *Citizens United v. FEC*,[100] some commentators have gone so far as to say that corporations

91. Citizens United v. FEC, 558 U.S. 310, 465 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990)).

92. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (quoting *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part)).

93. *See* Kim, *supra* note 51, at 784.

94. *Id.*

95. Kent Greenfield et al., *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 878 (2007).

96. Ripken, *supra* note 32, at 100–01.

97. PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 1 (1962).

98. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 486–87 (2006).

99. *Id.* at 487.

100. 558 U.S. 310 (2010).

are people, at least for First Amendment purposes.[101] An obvious question is: Once corporations are people for one right, why would they not be people in terms of other rights?[102] Hence, some Supreme Court Justices have questioned whether there was a mistake when the Court gave human characteristics to an artificial creature created by state law.[103] Justice Stevens explained that people with differing understandings of the nature of corporations can all see that corporations are distinguishable from human beings and the government must therefore regulate them differently.[104] It is possible that the United States may need a constitutional amendment to determine a corporation's ultimate status.[105] For example, many scholars argue that the United States may need a constitutional amendment that states that corporations only have the rights specifically granted to them.[106]

Until an amendment is forthcoming, this Article argues that the law should draw a crucial distinction between individuals and corporations, at least when it comes to how the law treats the application of the exclusionary rule.

C. *The Purpose of Corporate Criminal Liability*

Beginning over one hundred years ago, prosecutions of very large companies started becoming more common; today, it is even possible for such a prosecution to result in the company's death.[107] Organizations are uniquely limited to fines and other non-incarcerating criminal penalties,[108] but they are obviously still subject to significant repercussions.[109] Some argue, however, that when a court punishes a corporation, what really happens is that the court punishes stockholders, most of whom were perfectly innocent, and the court essentially deprives

101. Christopher Slobogin, Citizens United *and Corporate and Human Crime*, 41 STETSON L. REV. 127, 127 (2011) (quoting Jim Hightower, *Fighting the Subversion of Our People's Sovereignty*, TRUTHOUT (Feb. 26, 2010, 12:30 PM), http://archive.truthout.org/jim-hightower-fighting-subversion-our-peoples-sovereignty57194).

102. Miller, *supra* note 29, at 915.

103. *See, e.g.*, *id.* at 897 (discussing Justice Sonia Sotomayor's reflections on whether the Court erred in giving a corporation human characteristics).

104. Citizens United v. FEC, 558 U.S. 310, 466 n.72 (2010) (Stevens, J., concurring in part and dissenting in part).

105. Mayer, *supra* note 59, at 651.

106. Dibadj, *supra* note 67, at 782.

107. Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liabilty Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 72.

108. Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 387 (1994).

109. *See id.* at 386–87.

them of their property with no ability to object or even be heard on the issue.[110] Other scholars argue that because of the difficulty involved in identifying and prosecuting an individual participating in corporate activities, the legal system needs to be able to use vicarious attribution for corporations.[111] However, still other scholars point out that this has led to criminal prosecutions even when corporate management apparently took significant steps to avoid the commission of criminal activities.[112] Prosecutors reportedly "want businesses to cooperate with them and aid them in their efforts to prosecute corporate employees who violate federal law. Prosecutors themselves will frankly admit that the purpose of corporate criminal liability is *not* to punish corporations, but to force them to help in the prosecution of their employees."[113] After the scandals surrounding companies such as Enron, WorldCom, and Tyco, Congress passed legislation (primarily the Sarbanes–Oxley Act of 2002) that not only increased penalties for preexisting crimes, but also created new criminal sanctions for behaviors that had not previously been deemed criminal.[114]

Deterrence, retribution, rehabilitation, and incapacitation are generally the quintessential purposes of criminal prosecutions.[115] The U.S. Supreme Court has held that deterrence is an appropriate purpose of criminal liability and that retribution is another legitimate basis for criminal corporate prosecutions because corporations can appropriately be considered blameworthy.[116] Another legitimate purpose of the criminal law is the expression of condemnation. There are a wide variety of types and degrees of condemnation for the different kinds of criminal acts. That being said, there is almost always some level of condemnation present, and some argue that this expression serves purposes beyond deterrence.[117] Helping to shape and convey society's feelings of

110. *See, e.g.*, V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 363 (1999) (citing N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492 (1909)).

111. Adlestein, *supra* note 108, at 385.

112. *Id.* at 386.

113. Hasnas, *supra* note 38, at 512.

114. *See* Nancy R. Mansfield et al., *The Shocking Impact of Corporate Scandal on Directors' and Officers' Liability*, 20 U. MIAMI BUS. L. REV. 211, 231 (2012) (emphasizing the number of unprecedented corporate scandals in the early twenty-first century and the Bush Administration's subsequent passage in 2002 of the Sarbanes–Oxley Act, which included provisions directly responding to these companies' past criminal acts).

115. *See* Brickey, *supra* note 6, at 605–06; Sheley, *supra* note 7, at 230.

116. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 492–93 (1909).

117. *See* Gilchrist, *supra* note 11, at 6; *see also* Kahan, *supra* note 51, at 618–19 (arguing that corporate crimes "denigrate social values" and that corporate criminal punishment helps reaffirm those values). For a discussion of the expressive function of criminal liability in the

condemnation is one of the possible goals of criminal law.[118] On the other hand, some might argue that neither expression nor retribution are proper goals. Many commentators believe that deterrence is the main object of corporate criminal liability,[119] and many scholars and judges treat it as the primary, if not sole, goal for such liability.[120]

Deterrence can be both general and specific in this context. General deterrence refers to the idea that even those who are not themselves punished can be deterred from committing a crime by observing or at least being aware of the punishment that others received for the same crime.[121] Specific deterrence, on the other hand, is directed at the actual (or specific) person or institution that committed the offense and tries to prevent that entity from committing the same or similar acts in the future.[122] To successfully use the deterrence rationale, and hence to justify corporate criminal liability as opposed to just individual liability, one must show that corporate criminal liability provides a marginal increase in deterrence in addition to the level that individual liability alone accomplishes.[123] To demonstrate this more effectively, it is useful to understand some of the specific factors that affect decision-making behavior. In at least one survey of corporate ethics, the survey classified "superiors" as the most important contributing factor to criminal or unethical decision-making.[124] In view of this, criminal liability should encourage the optimal level of effort on the parts of owners and managers when they guide their various agents to comply with the law.[125] As this Article discusses later, it is entirely possible that removing the reassurance of the exclusionary rule and therefore making prosecution and conviction more likely will increase the amount of deterrence that corporations experience.

In line with maximizing utility, what a judge should do when punishing a corporation is encourage the corporation to engage in an amount of monitoring that will avoid criminal conduct that would harm society more than the cost of the monitoring.[126] Corporate liability may not only serve as an external constraint, but should also be considered a

---

intellectual property context, see Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 494 (2011).

118. *See* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 37.

119. *See, e.g.*, Khanna, *supra* note 110, at 363.

120. *See, e.g.*, Khanna, *supra* note 3, at 1494 nn.91–93.

121. Brickey, *supra* note 6, at 606.

122. *Id.*

123. Khanna, *supra* note 3, at 1494–95.

124. CLINARD & YEAGER, *supra* note 46, at 59.

125. *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972).

126. Alschuler, *supra* note 5, at 1360.

way to induce internal monitoring.[127] In addition, corporate crime seems to be a contagious problem. For instance, over the course of the last decade, almost all top tier pharmaceutical companies either agreed to a settlement involving significant misconduct or simply pled guilty.[128] In acknowledging the problem and referring to possible solutions, the U.S. Supreme Court made a significant point when it said that "to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[129] Today, this statement is almost certainly overstated due to the many administrative agencies and extended civil liability that could work to curtail corporate misconduct.[130] Notwithstanding this fact, laws dealing with corporate criminal liability not only survived, but also their number actually increased dramatically.[131] The survival and proliferation of these laws is caused in part by the law's capability to simultaneously achieve expressive benefits, positive consequential benefits, and retributive and just goals.[132] Whichever goals society chooses to pursue, the legal system still needs to address how to successfully accomplish them within the framework of corporate criminal liability.

D. *Achieving the Goals of Corporate Criminal Liability*

After the decision in *New York Central*,[133] courts used the principle of respondeat superior to establish liability without any significant additional analysis.[134] The statute under review in that case explicitly stated that the Court could hold a corporation liable.[135] Shortly after the Court resolved that case, many courts started reading other criminal statutes as though the legislature meant the statute to apply to corporations, even when there was little to no indication that the legislature intended to have that happen.[136] Under the newly established (at least in the criminal context) respondeat superior standard, there are three necessary conditions for a court to hold a corporation criminally

127. *Id.*
128. Beale, *supra* note 33, at 1484.
129. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495–96 (1909).
130. Baer, *supra* note 15, at 4.
131. *Id.*
132. *Id.* at 2.
133. 212 U.S. 481 (1909).
134. Alschuler, *supra* note 5, at 1364.
135. *N.Y. Cent.*, 212 U.S. at 491.
136. *See, e.g.*, United States v. Union Supply Co., 215 U.S. 50, 54–55 (1909); London v. Everett H. Dunbar Corp., 179 F. 506, 507, 510 (1st Cir. 1910); People v. Star Co., 120 N.Y.S. 498, 500 (N.Y. App. Div. 1909); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914).

liable: (1) an agent of the corporation acted with the requisite mental state, (2) the agent acted within the scope of his employment, and (3) the agent intended to benefit the corporation.[137]

In addition to courts' arguably unintended application of respondeat superior, some federal courts also imposed liability upon corporations based on a theory of collective mens rea.[138] Under this theory, no specific individual ever had the required mens rea, but the court could deem the corporation to have had it, which results in company liability even though the court could not identify a culpable individual.[139] An example of collective mens rea is if one agent of a corporation puts hazardous waste in a river without knowing that it is hazardous waste, and at the same time, another agent of the corporation does not put anything in the river but does know about the hazardousness of the material, then the corporation knowingly dumped the hazardous material in the river and is liable via the collective mens rea.[140]

In fact, not only is mens rea arguably simpler to prove in a corporate setting, but all of the elements of criminal corporate liability are fairly easily met for a number of reasons. For example, the requirement that an agent act within the scope of his employment can be satisfied even though the corporation explicitly forbade the wrongful conduct.[141] Another example of the ease of fulfilling the requirements is the requirement that the agent "benefit the corporation."[142] This element can be satisfied even if that was not his only motivation or if he had ultimately not benefitted the corporation at all.[143] Some argue that even potentially excessive prosecutions of corporations—which result in punishment for employees' actions that are clearly against publicized corporate policies—can help to deter wrongdoing and serve to encourage corporations to implement effective measures as opposed to empty policy declarations.[144] The idea is that it is less likely that a corporation could impose a facially solid compliance program and never actually affect the culture or desire to comply with the law.[145] Due to this possibility, courts

137. Khanna, *supra* note 3, at 1489–90.

138. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 501 (1996).

139. *Id.*

140. Khanna, *supra* note 110, at 408.

141. Khanna, *supra* note 3, at 1489.

142. *Id.* at 1490.

143. *Id.* Practically speaking, whether the culture of the corporation partially caused the criminal activity or it was simply a "rogue" employee is something prosecutors consider. Baer, *supra* note 15, at 7.

144. *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 55–56 n.6 (1986).

145. Ramirez, *supra* note 53, at 965–66.

usually do not acknowledge even extensive compliance programs as a defense to the illegal conduct, even if only one employee committed the crime.[146] Avoiding criminal behavior is obviously very desirable, but extreme penalties can cause overdeterrence and lead to an inappropriate increase in corporate resources devoted to enforcement.[147]

One of the most important questions that the courts must answer to achieve an optimal criminal law system in both the individual and corporate contexts is what evidence will be permissible in prosecutions. The next Part analyzes this issue and explores the arguments for and against the use of the exclusionary rule as a tool to protect defendants' Fourth Amendment rights.

II. THE EXCLUSIONARY RULE

Admitting relevant evidence—unless there is a good reason to exclude it—and excluding irrelevant evidence are two fundamental tenets of evidence law.[148] Arguably, the exclusionary rule violates this tenet. The rule prevents courts from admitting evidence obtained in violation of the Constitution.[149] Specifically, and most relevant for this Article, the prosecution cannot introduce evidence, obtained in violation of the Fourth Amendment, at trial to prove the defendant's guilt.[150] It is worth examining why the rule exists, where it originated, and what role it should play for corporate criminal prosecutions.

A. *The History of the Exclusionary Rule*

While the exclusionary rule applies almost exclusively to criminal law, the Fourth Amendment deals with all searches and seizures and does not distinguish between criminal and civil matters.[151] The Amendment also does not discuss suppression of evidence gathered in violation of its commands.[152] The exclusionary rule first appeared in a fairly cryptic form in the 1886 case of *Boyd v. United States*[153] and made its first significant

146. Brickey, *supra* note 6, at 604.

147. Fischel & Sykes, *supra* note 27, at 325–26.

148. *See* Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 562–63 (2013).

149. Weeks v. United States, 232 U.S. 383, 398 (1914) (applying the exclusionary rule in federal court), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule in state court).

150. *Id.*

151. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994).

152. Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

153. 116 U.S. 616, 638 (1886). For an analysis of this issue, see Thomas Y. Davies, *An Account of* Mapp v. Ohio *That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622–23 (2007).

appearance in the 1914 case of *Weeks v. United States*.[154] In fact, until well into the nineteenth century, courts did not consider the source of the evidence but rather only its probative value.[155] If evidence was probative, the court admitted it.[156] Courts have acknowledged that the suppressed evidence can at times be the best evidence possible about a defendant's guilt or innocence.[157] In England, if physical evidence is obtained by a coerced confession, the physical evidence is admitted and only the confession itself is suppressed.[158] Scholars characterize all evidentiary practices that prevent information from being viewed by the judge or jury as "truth-suppressing devices."[159] The courts held early violators of search and seizure law civilly liable for offenses including trespass, assault and battery, false imprisonment, or malicious prosecution.[160] As the Supreme Court said, excluding evidence is not considered vitally necessary to protect constitutional rights in most of the English-speaking world.[161]

There is in fact nothing in the Fourth Amendment that expressly precludes the use of evidence obtained in violation of that Amendment.[162] Some commentators claim that the Framers deemed remedies such as civil lawsuits for damages to adequately protect the rights that they had established.[163] The birth of the modern police force and diminution of tort remedies for trespass and false arrest at least partly necessitated the birth of the exclusionary rule.[164]

Over one hundred years ago, the Supreme Court stated that "[t]he maxim that 'every man's house is his castle,' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the

154. 232 U.S. at 390, 398 (1914); *see* Davies, *supra* note 153, at 623 (discussing *Weeks v. United States*).

155. *See, e.g.*, *Weeks*, 232 U.S. at 395–96 (discussing *People v. Adams*, a case in which the Supreme Court held that if the property seized was competent evidence, it was admissible at the trial).

156. Charles D. Levine, *The Second Circuit Constricts the Applicability of the Exclusionary Rule*, 50 BROOK. L. REV. 601, 603–04 (1984).

157. Stone v. Powell, 428 U.S. 465, 490 (1976).

158. Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 29 (1986).

159. Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 47 (2010).

160. *Id.* at 8–9.

161. Linkletter v. Walker, 381 U.S. 618, 630 (1965).

162. United States v. Leon, 468 U.S. 897, 906 (1984).

163. *E.g.*, Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 758.

164. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1595 (1996).

citizen."[165] The Supreme Court at one point went so far as to say that if the government can confiscate letters and other private documents to use against a defendant, the government would render meaningless the protections of the Fourth Amendment against searches and seizures.[166] Fourth Amendment breaches reflect "a failure to foster a constitutional culture in which rights are fully respected, and the denial of a remedy for breach by society's representatives is a de facto endorsement of the wrong."[167] At the same time, nothing is said in the Fourth Amendment about how the government should enforce the right to be free from unreasonable searches and seizures.[168] The only constitutional requirement that ensures the protections of the Fourth Amendment is that there be "some effective remedy."[169] On the other hand, the Court described the exclusionary doctrine as an essential component of the right to privacy.[170] Even before the Supreme Court applied the exclusionary rule to the states, some states independently decided that exclusion was an appropriate remedy; for example, California believed that other remedies were not sufficient, and therefore it had to impose the exclusionary rule upon itself.[171] Eventually, the Supreme Court agreed and stated that other remedies had failed to uphold the guarantees of the Fourth Amendment, and therefore the Court had to apply the exclusionary rule to the states.[172]

Initially, the Court examined multiple rationales for doing so. The Court examined protecting judicial integrity along with protecting the personal constitutional rights of defendants; however, the Court ultimately saw deterring law enforcement misbehavior as the dominant rationale.[173] The Court held in 1960 that the "purpose [of the exclusionary rule] is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[174] As early as the mid-1970s, courts discussed deterrence as the

165. Weeks v. United States, 232 U.S. 383, 390 (1914) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 425–26 (7th ed. 1903)).

166. *Id.* at 393.

167. Taslitz, *supra* note 98, at 575.

168. Davis v. United States, 131 S. Ct. 2419, 2423 (2011).

169. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1385 (1983).

170. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

171. People v. Cahan, 282 P.2d 905, 911 (1955).

172. *Mapp*, 367 U.S. at 652.

173. Levine, *supra* note 156, at 606.

174. Elkins v. United States, 364 U.S. 206, 217 (1960).

primary, if not the only, relevant purpose.[175] In one of the earliest modern-day exclusion cases, the Court pointed out that the rule was not a "command" of the Fourth Amendment but rather a judicially fashioned rule of evidence.[176] Further, because the purpose of most rules of evidence is to enable the discovery of the truth by preventing the introduction of unreliable evidence and evidence intended to mislead,[177] and the exclusionary rule blatantly contradicts that principle,[178] the Court was very conscious of the costs it was imposing by mandating its use. Indeed, parties file suppression motions in approximately seven percent of criminal cases and are successful approximately twelve percent of the time.[179] While these figures may not sound high at first blush, some scholars claim that the criminal justice system may release as many as 55,000 or more accused criminals per year through the use of the exclusionary rule.[180] The Court acknowledged that even illegally seized evidence can be very probative and reliable.[181] Before a court excludes illegally obtained evidence, it has to balance the value of making judgments using all of the facts against the intended deterrent impact of excluding such evidence.[182]

In the past, courts applied the exclusionary rule much more liberally and in fact almost automatically once courts found a Fourth Amendment violation.[183] Today, courts refuse to apply the exclusionary rule in many situations.[184] Some scholars discuss the seeming arbitrariness of the exceptions that courts currently apply to the exclusionary rule.[185] Whether arbitrary or not, there are certainly a significant number of them. Courts ruled evidence admissible for particular purposes such as

175. Levine, *supra* note 156, at 601–02.

176. *Mapp*, 367 U.S. at 661 (quoting Wolf v. Colorado, 338 U.S. 25, 39–40 (1949)).

177. Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 941 (1983) (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 152 (2d ed. 1972)).

178. *Id.* at 941–42.

179. Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (citing Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1728 (2005)).

180. *E.g.*, Patrick Tinsley et al., *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 68 (2004).

181. *See* United States v. Janis, 428 U.S. 433, 447 (1976) (stating that a negative consequence of the exclusionary rule is that reliable evidence would be deemed unavailable).

182. Levine, *supra* note 156, at 609 (citing *Janis*, 428 U.S. at 453–54).

183. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2427 (2011).

184. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 40 (1979); United States v. Caceres, 440 U.S. 741, 754–55 (1979); *Janis*, 428 U.S. at 454.

185. *E.g.*, Dripps, *supra* note 164, at 1608–09.

impeachment,[186] civil tax cases,[187] and grand jury proceedings.[188] In many settings, the question as to whether the court should use the exclusionary rule has resulted in conflicting decisions by many lower courts.[189] In other situations, courts established that exclusion is inappropriate.[190] Courts may exclude evidence from the case in chief that is later used to impeach a defendant.[191] When police officers make a "good-faith" error, the evidence recovered is not excluded, pursuant to the so-called *Leon* exception.[192] The Court in *Arizona v. Evans* extended the *Leon* exception to clerical errors[193] and under some circumstances to legislative mistakes in *Illinois v. Krull*.[194] The Court also held that the exclusionary rule does not apply to violations of the "knock and announce rule"[195] or to civil deportation proceedings.[196]

Today's courts apply a balancing test to the exclusionary rule and only use it when the advantages of deterring police misconduct outweigh the societal costs of excluding valuable information.[197] Multiple scholars claim that it is a totally different situation when police procedures intentionally and blatantly violate the Constitution rather than when one police officer, perhaps even accidentally, acts inappropriately.[198] As the Supreme Court pointed out, to answer the question of whether to exclude evidence, one must mediate "between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'"[199] Police conduct leads to exclusion only when it is deliberate enough to produce

186. *See, e.g.*, United States v. Havens, 446 U.S. 620, 627 (1980).

187. *See, e.g.*, *Janis*, 428 U.S. at 453–54.

188. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 354 (1974).

189. Robert H. Solmon, *The Seventh Circuit Adopts a Good Faith, Reasonable Belief Exception to the Exclusionary Rule in OSHA Proceedings*, 62 WASH. U. L.Q. 189, 192 (1984).

190. *Id.* at 194 n.31.

191. Oregon v. Hass, 420 U.S. 714, 722 (1975); Walder v. United States, 347 U.S. 62, 65 (1954).

192. *See* United States v. Leon, 468 U.S. 897, 924–25 (1984).

193. 514 U.S. 1, 16 (1995).

194. 480 U.S. 340, 349–50 (1987); *see* Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 37 (1996) (discussing related cases).

195. Hudson v. Michigan, 547 U.S. 586, 599–600 (2006).

196. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984).

197. *See, e.g.*, United States v. Caceres, 440 U.S. 741, 754–55 (1979); United States v. Calandra, 414 U.S. 338, 348 (1974).

198. Dripps, *supra* note 164, at 1613–14.

199. United States v. Leon, 468 U.S. 897, 900–01 (1984) (quoting Alderman v. United States, 394 U.S. 165, 175 (1969)).

meaningful deterrence and culpable enough to merit the loss to the justice system.[200] Since *Leon*, courts have focused on the seriousness and obvious nature of police actions when making the cost–benefit analysis.[201] "In order to exclude unlawfully-obtained evidence, the benefit of 'some incremental deterrent' to police misconduct must outweigh the 'substantial social cost' of setting a criminal free."[202] In *Leon,* the Court explicitly stated that "the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom."[203] Furthermore, the Supreme Court explained that in the context of the Fourth Amendment, there are ways to modify the exclusionary rule without inhibiting it from exercising its original function.[204] The Court has stated that society must take the "bitter pill" of exclusion only as a last resort.[205]

B. *Arguments Supporting the Exclusion of Evidence*

Over the decades since the exclusionary rule has been in effect, there have been many arguments both defending it and attacking it. This Section addresses in more detail some of the primary arguments supporting the proposition that courts should exclude evidence that is illegally obtained. As discussed in the previous Section, by far the primary justification for the exclusionary rule is that it is the only effective way to deter police misconduct. The Supreme Court has also, however, offered judicial integrity as another ground for the exclusionary rule.[206] By doing so, it was following Justice Louis Brandeis's earlier dissent in which he wrote: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[207] The rationale of judicial integrity contains two ideas: (1) stopping the wrongdoer from getting the advantage of his wrong by not allowing the use of illegally seized evidence and (2) protecting the trust in governmental institutions is

200. Davis v. United States, 131 S. Ct. 2419, 2428 (2011).

201. *Id.* at 2427.

202. Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 48 (2010) (citations omitted) (quoting Herring v. United States, 129 S. Ct. 695, 700 (2009)).

203. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

204. *Id.* at 905 (majority opinion).

205. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

206. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citing Elkins v. United States, 364 U.S. 206, 222 (1960)).

207. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

paramount.[208] This argument boils down to the idea that it is necessary to uphold the stature of the courts and that this would become difficult if they allowed lawless behavior.[209]

Another argument in favor of exclusion is actually a response to the claim that alternative responses could achieve the deterrent effect society desires. One often suggested alternative is the possibility of damages, meaning that the victims could sue and recover from the police officer who violated their rights.[210] Some are concerned, however, that restitution to victims will not appropriately deter police officers from violating the law.[211] There is somewhat conflicting evidence on the successfulness or realism of suing police departments.[212] Most winning damages cases involve some type of police brutality or illegal detention.[213]

Obtaining reparations in this form is difficult for multiple reasons. For one, it is hard to get damages in civil cases even if a violation is shown because the specific harm caused by the violation is difficult to prove.[214] Attorneys' fees may only be available in some cases.[215] Additionally, jurors are reluctant to find in favor of plaintiffs who have been convicted of a related offense.[216] It is well known that jurors do not like to award damages to convicted felons.[217] Another difficulty with the damages remedy is that the largest harm is possibly the jail time associated with conviction, and it is unlikely that anybody would agree to pay a guilty defendant based upon the length of her sentence.[218] Another hurdle for a plaintiff—who is a civil plaintiff and is most likely also a criminal defendant—to overcome is that for him to prevail, he would need to show not only that there has been a constitutional violation, but also that qualified immunity does not bar recovery.[219] Under "qualified immunity," in many situations a government official cannot be sued if the conduct did not violate clear rights that a reasonable person would have

208. Charles E. Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667, 680.

209. *See id.* at 680–81.

210. *See* Barnett, *supra* note 177, at 942.

211. *See id.* at 943–44.

212. Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743, 754 (2010).

213. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 919 (1991).

214. Cassell, *supra* note 163, at 857–58.

215. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

216. Barnett, *supra* note 177, at 943.

217. Bloom & Fentin, *supra* note 202, at 77.

218. *See* Stuntz, *supra* note 213, at 900–01.

219. Bloom & Fentin, *supra* note 202, at 76.

known about.[220] However, under some circumstances, officials can lose that immunity.[221] Qualified immunity may not apply if the violation is egregious, such as if the search warrant did not describe any of the items to be seized,[222] but this is not an easy hurdle to overcome. Another potential problem for alternative remedies is the fact that the courts have upheld agreements in which search victims waive civil remedies in exchange for a favorable plea bargain.[223] So, if a police officer violates someone's rights, the government could persuade the defendant away from enforcing his rights as part of a plea negotiation.

On the other hand, the legal system may not reach the desired goal even if there are successful lawsuits against the police. A possible problem with direct remedies against police officers may be overdeterrence.[224] The concern is basically that society does not want police officers to avoid searches of criminal suspects all the time out of fear for the officers' own homes or personal property if they are mistaken about the constitutionality of a search.[225] If damages are too high, they will result in overdeterrence, but if they are too low, they will not deter enough.[226] The courts can potentially avoid this problem if they impose liability on the state rather than the officer and have the state encourage individuals to act lawfully.[227] Other possible approaches could include the use of police department administrative procedures or even possibly criminal prosecutions for violating a suspect's constitutional rights,[228] although these measures all contain their own difficulties.

One issue with any of these alternative forms of enforcing the constitutional protections occurs if the agents of the state are unknown, as in *Weeks v. United States*.[229] If the individuals' identities are unknown, they cannot be personally sued and departments cannot take administrative action against them. Additionally, the Supreme Court pointed out the past ineffectiveness of prosecutions against police

220. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

221. *See, e.g.*, Taslitz, *supra* note 98, at 519 (discussing *Groh v. Ramirez*, 540 U.S. 551 (2004), where a search team leader lost immunity for failing to check for a defective warrant).

222. *See Groh*, 540 U.S. at 558.

223. Dripps, *supra* note 212, at 758.

224. *See* John C. Jeffries & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1407–08 (2007).

225. *See* United States v. Leon, 468 U.S. 897, 973 n.28 (1984) ("[The exclusionary rule] avoids the obvious unfairness of subjecting the dedicated officer to the risk of monetary liability for a misstep while endeavoring to enforce the law.").

226. Dripps, *supra* note 212, at 746.

227. *See Leon*, 468 U.S. at 974 n.28.

228. *See* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring).

229. 232 U.S. 383, 387 (1914).

officers, administrative disciplinary actions, and trespass tort suits.[230] Various scholars claim all the remedies other than exclusion are useless.[231] In fact, some Justices have gone so far as to say that without the use of exclusion, the result is effectively no sanction at all.[232] The modern courts' approach to Fourth Amendment violations reflects the idea that once someone suffers a harm stemming from the violation, it cannot be repaired, and that privacy harms are irreversible.[233] Therefore, damages would not suffice to correct the problem.

C. *Arguments Against the Exclusion of Evidence*

One of the most famous quotations dealing with the exclusionary rule comes from Justice (then-Judge) Benjamin Cardozo, who said, "The *criminal* is to go free because the constable has blundered."[234] While this quotation encompasses much of what many people find objectionable about the exclusionary rule—that a criminal goes free due to a mistake—it is far from the sole objection to the rule. This Section examines several of the criticisms to the rule in preparation for applying its rationales to corporations, which is explained in Part III.

As Justice Potter Stewart pointed out, there are at least four legitimate objections to the exclusionary rule: (1) it works only by imposing a very high cost on society, depriving courts of reliable evidence and freeing the guilty; (2) it may not in fact deter unconstitutional police conduct; (3) it may benefit a defendant in a way that is not proportional to the Fourth Amendment rights that were violated; and (4) it "compensates" only those accused of a crime.[235] In the case of *People v. Defore*, Justice (then-Judge) Cardozo gave a further oft-repeated argument against the exclusionary rule that this Article mentioned previously: there are other ways to enforce the Fourth Amendment. Cardozo argues in *Defore* that the remedies available were a lawsuit by the victim, prosecution of the officer for oppression, removal of the officer from his position, or other various types of work-related sanctions imposed by the officer's superiors.[236] In addition to Justice Cardozo's ways of enforcing the Fourth Amendment, Professor Akhil Amar points out multiple options available to prevent constitutional violations, including injunctions, respondeat superior or vicarious liability, administrative regulations and

230. *Mapp*, 367 U.S. at 670.

231. *E.g.*, William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 818 (2000) (quoting *Mapp*, 367 U.S. at 652).

232. *E.g.*, Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).

233. Heffernan, *supra* note 231, at 800.

234. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (emphasis added).

235. Stewart, *supra* note 169, at 1393–96.

236. *Defore*, 150 N.E. at 586–87.

remedies, *Bivens* actions, and class actions.[237] Also, police departments have various other responses to officer violations of search and seizure policies, ranging from time off with or without pay to expulsion from the police force.[238] Different possible responses to violations of the Fourth Amendment could include criminal penalty options that already exist, such as criminal sanctions for unlawful detention, criminal trespass, or deliberate official misconduct.[239] Justice Antonin Scalia pointed out that there are also an increasing number of alternative remedies, including the recognition of entity liability, attorneys' fees paid to § 1983 plaintiffs, and increased police professionalism.[240]

There are additional criticisms of the deterrence rationale outside the claim that other means may be more effective or have lower costs. Some scholars suggest that under particular circumstances, the rule may not deter police officers because the exclusion of the evidence does not concern them given that they are pursuing goals other than prosecution.[241] For example, a police officer may knowingly violate the Constitution if she thinks that catching a juvenile in the act of committing a crime may enable him to get counseling or even possibly just "scare him straight."[242] In these types of situations, exclusion will likely have little to no effect.[243] The power of the incentive that motivates the illegal act dictates whether deterrence works.[244] Another circumstance under which deterrence is ineffective is if the evidence is perishable and the officer knows it is going to be destroyed.[245] Unless the evidence is obtainable by constitutional means, exclusion of the evidence will have absolutely no deterrent effect whatsoever because the police are better off gathering it either way.[246] For example, if an officer knows or suspects that if she does not go into a house immediately, the perpetrator will destroy the illegal drugs (but she does not have enough information to satisfy an exigent circumstance requirement which would allow the search), she is unlikely to refrain from entering the house simply because the court could exclude the drugs she finds. This is especially true if she knows that it is possible that the government may use the evidence in some other way, such as for impeachment purposes.

237. Amar, *supra* note 151, at 759.

238. Cassell, *supra* note 163, at 851.

239. *See, e.g.*, *id.* at 853.

240. Dripps, *supra* note 212, at 752.

241. *See, e.g.*, Rosenberg, *supra* note 194, at 43.

242. *See id.* A police officer may make an illegal search if it enabled him to help a child by telling the child's parents about the situation, even if the court did not allow any evidence he found in a proceeding. *Id.*

243. *See id.*

244. Hudson v. Michigan, 547 U.S. 586, 596 (2006).

245. Barnett, *supra* note 177, at 959.

246. *Id.* at 957.

In addition to the questionable effectiveness of the rule and the existence of alternative means of deterrence, commentators point out other objections to the exclusionary rule. Some jurists note its high costs, "including the suppression of reliable evidence, deflection of the fact-finding process that often frees the guilty, diversion of attention from the central question of guilt or innocence, and the resulting disrespect for the law when evidence is excluded for minor and inadvertent Fourth Amendment violations."[247] This disrespect for the law is often referred to or characterized as the judicial integrity argument that this Article mentioned previously.[248] While courts must guard the integrity of the judicial process, this concern is not very effective as a justification for the exclusion of extremely probative evidence.[249] The integrity argument relies on the idea that in some ways admitting the evidence makes the court a party to the constitutional violation. That being said, this begs the question of what part of the Constitution mandates that courts not use illegally obtained evidence in a criminal prosecution.[250] Furthermore, the integrity argument can at least in part be rebutted if one recognizes the three purposes that a judge has: (1) to do justice; (2) to protect the public from dangerous individuals; and (3) to protect everyone's constitutional rights, although these purposes are potentially in tension with one another if a judge believes that the police violated a dangerous individual's rights.[251] This tension can lead to a seeming loss of integrity on the part of the courts, regardless of the way in which they rule on the tainted evidence.[252] Resolving the issue optimally is key because overuse of the exclusionary rule may result in ridicule and disrespect for the law and judicial system.[253] In fact, observers note that it is even possible for the Fourth Amendment itself to become contemptible or disfavored by both judges and citizens due to the exclusionary rule.[254] Critics point out that when the public's perception is that the outcome offends justice, that in turn can *also* damage judicial integrity.[255] Arguably, the court could maintain its integrity if the judge could award sanctions against the police while still using the evidence against the defendant.[256]

This argument about maintaining judicial integrity by awarding sanctions raises the question of how the law could best structure damages.

247. Rosenberg, *supra* note 194, at 35.
248. *See supra* text accompanying notes 186–88.
249. Stone v. Powell, 428 U.S. 465, 485 (1976).
250. Stewart, *supra* note 169, at 1383.
251. Barnett, *supra* note 177, at 963.
252. *See id.*
253. United States v. Leon, 468 U.S. 897, 908 (1984).
254. *See, e.g.*, Amar, *supra* note 151, at 799.
255. *See, e.g.*, Trant, *supra* note 208, at 709.
256. Barnett, *supra* note 177, at 964.

Shortly before the *Mapp* case, the Court construed 42 U.S.C. § 1983 to permit damages suits for Fourth Amendment violations.[257] Damages may be more appropriate for at least three reasons; namely, they compensate innocent and guilty individuals, they can be proportionate as they vary depending upon the conduct, and they could represent a more effective form of "specific deterrence" against the officer involved.[258] The use of restitution also allows both the guilty and the innocent to benefit because parties who suffered unconstitutional searches but never became criminal defendants could also sue.[259] Damages are more precise and can better protect against the risks of overdeterrence or underdeterrence because the legal system can calibrate them to each case.[260] Furthermore, you can hold a government body liable if a governmental policy enabled or contributed to the unconstitutional act.[261] A possible civil action against the state may be effective because it would give the victim a deep pocket to pursue and would incentivize the state to properly train and motivate its police officers.[262] Historically speaking, civil trespass actions, for example, have flourished against many different kinds of government agents.[263]

Another argument against the exclusionary rule is basically that it is both disproportionate and rewards the wrong party. Jurists argue that the exclusionary rule is irrational in that it overly rewards criminals by commuting all penalties from crimes they in fact did commit while simultaneously never compensating the innocent for any of their real injuries.[264] The bottom line effect of the exclusionary rule is often to prevent the truth from being exposed and allow a guilty individual to continue walking among other members of the community with no punishment or consequences.[265] In fact, even the Supreme Court seems to acknowledge that suppressing probative evidence is a windfall for criminals.[266] In *Linkletter v. Walker*,[267] the Court has stated and repeated that '"[r]ejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . [It] does nothing to protect innocent persons who are the

257. Monroe v. Pape, 365 U.S. 167, 172 (1961).

258. Stewart, *supra* note 169, at 1387, 1400.

259. Barnett, *supra* note 177, at 962.

260. Amar, *supra* note 151, at 798 ("Money is infinitely divisible . . . .").

261. Stewart, *supra* note 169, at 1387.

262. Cassell, *supra* note 163, at 854.

263. Amar, *supra* note 151, at 786.

264. Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 228 (1978).

265. Davis v. United States, 131 S. Ct. 2419, 2427 (2011).

266. Heffernan, *supra* note 231, at 800.

267. 381 U.S. 618 (1965).

victims of illegal but fruitless searches."'[268] It gives the innocent nothing while it frees the guilty.[269] In addition to rewarding the guilty, it is also potentially ill-timed and grossly disproportionate.[270] The wrongs condemned by the Fourth Amendment's violations are complete with the unlawful search or seizure, and the exclusionary rule cannot remove or even repair the already suffered breach of the defendant's rights.[271] On the other hand, some commentators suggest that while the breach of the defendant's rights may complete the irreversible harm, it may not be a significant enough harm to justify the rule in the first place. These commentators explain that the typical harms resulting from a standard wrongful house search are dignitary (but not usually massive) and may also include some mild property damage.[272] Thus, there is a potential disparity between the "offense," which may be a relatively small constitutional violation, and a remedy in the form of the release of a criminal. Chief Justice Warren Burger gave the classic statement of this critique when he wrote that "[f]reeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."[273]

The final objection to the exclusionary rule discussed in this Section is the more general idea that it violates some of the basic purposes of the court and judiciary system. The Supreme Court directs that the aims of the law are that no innocent suffer and no guilty escape.[274] In the application of the exclusionary rule, the exact opposite occurs; the guilty do escape while the innocent suffer. The most basic role of the judiciary is that the court should try those properly brought before it, convict and pronounce a just punishment for those who are guilty, and acquit those who are innocent.[275] A significant cost of applying the exclusionary rule is the impairment of this truth-finding function of the judge and jury.[276] Other costs, in addition to this impairment, are those associated with charges that had to be dropped and significantly less leverage for

268. *Linkletter*, 381 U.S. at 632 (quoting Irvine v. California, 347 U.S. 128, 136 (1954)).

269. Cassell, *supra* note 163, at 854.

270. *See, e.g.*, *id.* at 848; John Gruhl, *The Impact of Term Limits for Supreme Court Justices*, 81 JUDICATURE 66, 71 (1997).

271. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

272. Stuntz, *supra* note 213, at 894.

273. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

274. Berger v. United States, 295 U.S. 78, 88 (1935).

275. Amnon Straschnow, *The Exclusionary Rule: Comparison of Israeli and United States Approaches*, 93 MIL. L. REV. 57, 76 (1981).

276. *Leon*, 468 U.S. at 907.

prosecutors during plea bargaining sessions and at trial.[277] Some jurists have criticized the costs of the exclusionary rule to the point where they question its continued need.[278] At least to some observers, two wrongs do not make a right, and similarly, one evil (police misconduct) is not corrected by another evil (letting a guilty man go free).[279]

Now that this Article has analyzed both the arguments in favor of the exclusionary rule and those opposed to it, it analyzes how these arguments relate to corporations. It is useful to begin, however, with a look at the applicability of the Fourth Amendment itself to corporations.

III. THE EXCLUSIONARY RULE AND CORPORATIONS

This Part examines the applicability of the exclusionary rule in the corporate setting. It then examines both the goal of deterrence and other historical rationales for the rule to show that all of them support only a narrow application of the rule in the corporate setting. Finally, this Part presents a proposal to have a default prohibition against use of the exclusionary rule in the corporate setting.

A. *The Fourth Amendment and Corporations*

As this Article previously indicated, the Constitution is silent about corporations, which is particularly understandable given that there were fewer than 400 corporations in existence during the Eighteenth Century.[280] It is likely that the Framers were not particularly concerned with the rights of these fairly rare entities. According to the U.S. Census Bureau, there were approximately six million corporations as of a few years ago.[281] Hence, the issue of corporations' constitutional status, which may not have weighed heavily on the Framers' minds, is much more significant today. Conflicts involving an increasing number of constitutional rights being applied to corporations are likely given the fact that courts are already struggling with an expansion of corporate First Amendment rights.[282] As many scholars and authors point out, the number of prosecutions of corporate defendants by the federal government has generally increased over time;[283] thus, parties litigate

277. Heffernan, *supra* note 231, at 825.

278. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 595 (2006) (discussing the costly litigation that generates as a result of the exclusionary rule).

279. Straschnow, *supra* note 275, at 77.

280. Citizens United v. FEC, 558 U.S. 310, 386–87 (2010) (Scalia, J., concurring); *see supra* Section I.B.

281. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 491 tbl.744 (131st ed. 2012).

282. Miller, *supra* note 29, at 956.

283. *See, e.g.*, Adlestein, *supra* note 108, at 377.

constitutional issues surrounding the status of corporations more frequently.[284]

The focus of this Article is whether and how the Fourth Amendment should apply to corporate entities. The full text of the Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[285]

The Supreme Court has explicitly noted that the state cannot use the provision of special advantages given to corporations, such as perpetual life or limited liability, as a price for the forfeiture of constitutional rights.[286] On the other hand, there are several examples of individuals or groups who receive different constitutional protections depending upon their status, including students in public schools,[287] prison inmates,[288] members of the military,[289] and federal employees.[290] As undeniable as it is that the law often considers corporations as "persons" under a familiar legal fiction, it is also true that this fiction exists to protect human beings.[291] To determine if a corporation gets any particular constitutional protection, look at the nature, history, and purpose of the part of the Constitution in question.[292] The goals of the Fourth Amendment—privacy; dignity; and the ability to secure one's person, home, and papers—point toward a personal right, and if analyzed by this standard, a corporation may not be able to receive Fourth Amendment protection.[293] The Supreme Court has in fact repeatedly held that

284. *Id.* at 376–77.

285. U.S. CONST. amend. IV.

286. Citizens United v. FEC, 558 U.S. 310, 350–51 (2010).

287. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (The rights of a public school student are not "automatically coextensive" with those of an average adult.).

288. *See, e.g.*, Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (A prison inmate does not keep his First Amendment rights when they are "inconsistent with his status as a prisoner." (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974))).

289. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) (Based on the military mission of discipline and obedience, courts apply First Amendment protection differently to an individual in the military.).

290. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL–CIO, 413 U.S. 548, 593 (1973) (Congress has the power to limit First Amendment rights to federal employees by forbidding acts such as those linked to political campaigning.).

291. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

292. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778–79 n.14 (1978).

293. Miller, *supra* note 29, at 912.

protecting an individuals' security and privacy from government officials' arbitrary invasion is the primary purpose of the Fourth Amendment.[294] The Supreme Court clarified over a hundred years ago that it is the invasion of a person's right of personal security, liberty, and private property that is the essence of the offense, not the mere breaking of doors or rifling of papers.[295] Further, many would argue that a significant difference between privacy and property wrongs is that privacy wrongs are irreversible, and property wrongs are not.[296] In the corporate setting, however, this becomes highly confusing. How can a violation of a corporation's privacy rights compare to a violation of the privacy rights of an individual? It appears more likely that corporations would only suffer property right violations whose harms a court can reverse through monetary compensation.

Despite the differences between individuals and corporations, the latter have at times successfully availed themselves of a variety of provisions in the Bill of Rights since the 1970s.[297] Courts granted corporations a significant number of rights, including free speech (political, commercial, and negative free speech), trial by a jury, and freedom from unreasonable regulatory searches and double jeopardy.[298] The Constitution confers some rights to corporations but does not confer others.[299] Even though in recent years corporations have received more and more constitutional protections,[300] cases in which the courts deny corporations some of the rights that natural individuals have are not uncommon.[301] Over one hundred years ago, the Supreme Court established that there are distinctions between natural people and corporations, holding in *Hale v. Henkel* that the Fifth Amendment gives personal privileges to witnesses that corporations cannot invoke.[302] More recently, some Justices specifically emphasized the point that the law does not always have to treat corporations identically to natural persons.[303]

---

294. Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

295. Weeks v. United States, 232 U.S. 383, 391 (1914) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

296. Heffernan, *supra* note 231, at 801.

297. *See* Mayer, *supra* note 59, at 578 (providing examples of corporations that were successful in availing themselves of provisions in the Bill of Rights).

298. *Id.* at 582.

299. *See* Miller, *supra* note 29, at 910.

300. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part and dissenting in part).

301. *See, e.g.*, Adlestein, *supra* note 108, at 378–79.

302. 201 U.S. 43, 70 (1906), *overruled in part by* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

303. *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).

Today, it is well established that corporations or other forms of artificial entities should not receive protection under the Fifth Amendment.[304] The fact that corporations do not receive Fifth Amendment protection suggests that they also should not benefit from the safeguards of the Fourth Amendment. Given the parallels between the Fourth and Fifth Amendments—indeed, multiple Supreme Court Justices have mentioned these provisions' "intimate relation[ship]" and the fact that they almost run into one another[305]—it would be a strange outcome to have one apply when the other does not. A serious consideration in this context is also that courts should potentially not apply Fourth Amendment rights to corporations because courts cannot incarcerate corporations, which a number of scholars believe is a crucial distinction.[306]

While the Court did not establish the existence of the possibility of incarceration as a requirement, it could have an impact on the evaluation of the applicability of the Fourth Amendment in various situations. Justice Marshall stated that the best indication of whether an offense is serious is the use of incarceration as a punishment.[307] This suggests that courts should not necessarily grant the same level of constitutional protection when this "most powerful indication" is lacking. Notwithstanding the preceding argument, the Supreme Court has applied the Fourth Amendment to corporations and most recently explained that protecting the privacy interests of both employees and others associated with the corporation was a reason for giving corporations Fourth Amendment protection.[308]

In early cases, the Supreme Court established that Fourth Amendment violations could take place against individuals as well as corporations,[309] and it applies to both criminal and civil cases.[310] The Court has stated that a corporation "plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."[311] The Court also pointed out that the Fourth Amendment protects

304. Braswell v. United States, 487 U.S. 99, 102 (1988).

305. *E.g.*, Stewart, *supra* note 169, at 1373 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); *see Boyd*, 116 U.S. at 633 ("For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . .").

306. Adlestein, *supra* note 108, at 411.

307. Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989) (citation omitted) (quoting Muniz v. Hoffman, 422 U.S. 454, 477 (1975)).

308. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

309. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 397 (1914).

310. *E.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

311. Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986).

commercial buildings in addition to private homes because if it did not, this would go against the origin of the Amendment.[312] The Court has stated that under normal circumstances, a corporation should in many ways be treated the same as an individual under the Fourth Amendment in that other than in very specific types of cases a search of private property that has not been consented to and is not authorized by a legitimate search warrant is unreasonable.[313] The Supreme Court has made it clear that corporations are entitled to Fourth Amendment protection but that those safeguards may differ from those provided in a purely private context.[314] "Today, the corporate form legitimates the level, rather than the existence, of many corporate constitutional protections."[315] Ultimately, while corporations may be entitled to Fourth Amendment protection, the remedies might not be the same as for individuals.[316] While it is clear that businessmen should be able to go about their work in corporate settings free from unreasonable government entries—similar to how people have the right against such intrusions in private residences—[317] this says very little about how a corporation should be able to vindicate that right if it is breached.

B. *Applying the Exclusionary Rule to Corporations*

Because the exclusionary rule is not a command of the Fourth Amendment,[318] the fact that the Fourth Amendment does apply to corporations need not mean that the rule should. The Court has made it clear that whether it should apply the rule is a different question from whether the government violated Fourth Amendment.[319] The primary purpose of the exclusionary rule is to deter unlawful law enforcement activity, according to the Supreme Court.[320] In fact, the Court went further and held that the rule's *sole* purpose may be to deter future Fourth Amendment violations.[321] Additionally, the Court specified that the need for deterrence is a necessary condition but not a sufficient one.[322] Therefore, even if the court could increase the level of deterrence to some extent, this would not automatically mean that exclusion would be

312. *Marshall*, 436 U.S. at 311.

313. G.M. Leasing Corp. v. United States, 429 U.S. 338, 358 (1977) (quoting Camara v. Mun. Court, 387 U.S. 523, 528–29 (1967)).

314. *Id.* at 353.

315. Miller, *supra* note 29, at 918.

316. Braswell v. United States, 487 U.S. 99, 104 (1988).

317. *Marshall*, 436 U.S. at 312.

318. Wolf v. Colorado, 338 U.S. 25, 39–40 (1949) (Black, J., concurring).

319. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 223 (1983).

320. United States v. Janis, 428 U.S. 433, 446 (1976).

321. Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

322. Hudson v. Michigan, 547 U.S. 586, 596 (2006).

appropriate. Moreover, the Court has held that "[T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[323]

The Court noted in another context that white collar crime is one of the most serious problems confronting law enforcement and that the Court should scrutinize policies that would result in detrimental impacts on the government's efforts to prosecute this type of crime carefully.[324] Given the fact that most corporate crimes are white collar crimes, the Court somewhat weighted its analysis against exclusion from the beginning, even though both federal and state courts have expressed some concern over the failure of other remedies to fully protect the rights given by the Fourth Amendment.[325] Nevertheless, none of these past decisions addressed actors with the particular characteristics of corporations, including their greater ability to defend themselves in judicial proceedings.

In *Weeks*, the Court went as far as to state that without the remedy of suppression, there is no value in the supposed protection of the Fourth Amendment.[326] This becomes more complicated in the corporate context in which a court could suppress evidence for purposes of individual prosecutions (thus giving value to the Fourth Amendment) without necessarily doing so for corporate prosecutions. So even if a court adopts one of the earlier and stronger formulations of Fourth Amendment protections, such as the one in *Weeks*, the argument in favor of suppressing the evidence against a corporation is weaker than in other situations. More recently, the Supreme Court explicitly stated that a determination of the applicability of the exclusionary rule proceeds via a cost–benefit analysis of the specific circumstances.[327] Seemingly small differences in fact patterns can warrant exclusion or admission, a question whose answer could even turn on whether one's attorney objected to the evidence either during trial or pre-trial.[328] The Supreme Court has made it clear that only appreciable deterrence would justify use of the rule.[329] The idea is that if the deterrent benefits are not clear or are minimal, then

323. United States v. Calandra, 414 U.S. 338, 348 (1974).

324. *See* Braswell v. United States, 487 U.S. 99, 115 (1988).

325. *See* Linkletter v. Walker, 381 U.S. 618, 633–34 (1965).

326. Weeks v. United States, 232 U.S. 383, 393 (1914).

327. United States v. Leon, 468 U.S. 897, 906–07 (1984).

328. Stewart, *supra* note 169, at 1375 (comparing *Weeks v. United States* to *Adams v. New York*, 192 U.S. 585 (1904), in which an attorney objected at trial to the introduction of evidence).

329. *Leon*, 468 U.S. at 909.

the court should make an exception to the exclusionary rule.[330] Furthermore, it is not the case that simply showing deterrent value would require use of the exclusionary rule; rather, courts must still weigh the costs and benefits.[331] Other scholars argue that the exclusionary rule should apply differently to different types of defendants.[332] Corporations have several unique attributes that set them apart from individual defendants and make the use of the exclusionary rule inappropriate most of the time.

Many of the concerns that prompted use of the exclusionary rule are not present or are significantly reduced in corporate criminal settings. For example, the use of "brutal means" to coerce information about evidence was a partial motivator for use of the rule in some cases,[333] a problem that is highly unlikely to arise in the corporate context. Not only is there no "body" to brutalize in the traditional sense, but also the types of crimes that corporations may have committed (while potentially very damaging) are not the kinds that typically inflame police officers' passions. Related to this lack of a corporeal form is the fact that corporations cannot be incarcerated; hence, some form of fine is the only possible outcome for corporate prosecutions. Historically, early courts rooted the exclusion of various types of evidence in the "jealous regard for the liberty of the individual."[334] These circumstances are very different when there is no individual and "liberty" is not in question.

In *United States v. Janis*, the evidence illegally obtained against an individual was excluded at the state criminal trial but was used in the subsequent civil tax proceeding.[335] The court felt that the deterrence achieved by exclusion from the criminal trial was sufficient, while exclusion from the civil proceeding was not necessary.[336] This parallels the argument that this Article made above that a court could exclude illegally obtained evidence from individual prosecutions (those that may result in incarceration) but allow it in corporate prosecutions, the latter of which could only result in monetary fines or their equivalent.[337] Often, the more dramatic or serious the offense, the more likely police officers

330. Dripps, *supra* note 212, at 749.

331. Alderman v. United States, 394 U.S. 165, 174–75 (1969).

332. *See generally* Rosenberg, *supra* note 194 (discussing how despite the Court's inclination to refuse to apply the exclusionary rule, courts should make this decision on a case-by-case basis, especially with regard to delinquency matters).

333. *Id.* at 34.

334. People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901).

335. 428 U.S. 433, 459–60 (1976).

336. *Id.* at 454.

337. *See supra* text accompanying notes 306–07.

are to adhere to constitutional rules and avoid exclusion.[338] Hence, it is not clear what additional deterrence occurs if the corporation could be convicted because it seems likely that officers would still want individuals to go to jail, and such officers would therefore experience a level of deterrence from actions that could result in exclusion and failed convictions of individuals. Because courts are supposed to use a cost–benefit analysis in this area, pursuing corporations in that manner is likely appropriate on balance.

Scholars point out that the exclusionary rule usually protects relatively powerless defendants.[339] Corporations, however, are typically not powerless. A possible example of corporate power is the fact that in the fifty years following the establishment of corporations' rights under the Fourteenth Amendment, parties used less than one-half of one percent of all Fourteenth Amendment litigation to seek protection for African Americans (who were supposed to be important beneficiaries of the amendment), while more than fifty percent of this type of litigation dealt with the protection of corporations.[340]

It is also possible and even probable that police officers behave differently toward individuals depending on how likely specific individuals are to seek recourse.[341] Therefore, because corporations have significant resources to pursue other remedies, police officers would already be less likely to violate their rights. A challenge faced by those who pursue damages awards is the difficulty of finding and paying for an attorney,[342] which is generally much easier for a corporation. Other remedies may be more available to corporations as well, such as injunctions against the agencies that violated the law. This remedy is ultimately slight because the entity seeking the injunction has to show the likelihood of future injuries due to the illegal practice, and this is often difficult for a plaintiff to accomplish.[343] At the same time, corporations would be far more likely to be able to show this than would individuals, so this alternative may be more feasible in the corporate context. Corporations can show future injuries in multiple ways. For example, a police search of a corporation's premises will almost certainly disrupt business activities and cause a loss of productivity as well as possible reputational harm, which may translate to lost stock value.

---

338. Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 132 (2003).

339. Donald A. Dripps, *Constitutional Theory for Criminal Procedure*: Dickerson*,* Miranda*, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 46 (2001).

340. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

341. *See* Dripps, *supra* note 212, at 771.

342. Stewart, *supra* note 169, at 1388.

343. *Id.* at 1387.

Another example of corporations' increased power is their level of political connections. Scholars ask the question: "Are today's politicians more likely to impose effective 'direct sanctions' against the police than the politicians of yesteryear?"[344] When it comes to situations involving corporations or possibly unions, the answer to this question is likely yes. It is well known that corporations are heavily involved in politics and make financial contributions that would certainly give them an increased ability to affect politicians compared to the typical criminal defendant. A possible counterargument to corporations having more power than individuals is that corporations have a strong incentive to, and in fact often do, cooperate fully with the government during investigations.[345] Most corporate defendants plead guilty when charged with a crime.[346] Yet, the fact that corporations' power is not absolute does not negate that it is increased. The increase is the relevant factor in the balancing test and weighs on the side of not excluding evidence.

Another basis for not excluding evidence in corporate prosecutions are the multiple ways that the level of harm tends to be greater in those kinds of cases. The easiest method to see the increased harm is simply to understand that corporations are very inclined to continue committing crimes, and hence failing to stop them is more detrimental than failing to stop other defendants who may or may not continue committing crimes and hurting innocent people. Researchers have noticed a high level of consistency in corporate behavior, meaning that corporations tend to act either ethically or dubiously on a regular basis,[347] and they often engage in the same or very similar offenses repeatedly. Some scholars even argue for applying a "three strikes" rule to corporations in an attempt to address recidivism.[348]

In the same vein, when considering the harm caused, one must take into account the fact that the size of many corporations and their potentially widespread misconduct may contribute to increased harm when compared with the discrete behaviors of individual actors.[349] Different actions taken in remote locations within a corporation can combine to result in more harmful consequences than the individual conduct would seem to indicate. In many exclusion cases, the court deals with a completed crime. In corporate settings, the likelihood that the crime will continue is higher. Therefore, the use of evidence is more

344. *E.g.*, Kamisar, *supra* note 338, at 127.

345. *E.g.*, Hasnas, *supra* note 38, at 523 (using the federal investigation against KPMG, an accounting firm, to illustrate that a corporation will cooperate fully with the government to avoid federal indictment).

346. Adlestein, *supra* note 108, at 380.

347. Ripken, *supra* note 32, at 134; *see* Kim, *supra* note 51, at 800.

348. *See, e.g.*, Ramirez, *supra* note 53, at 973.

349. *See* Sheley, *supra* note 7, at 258–59.

likely to put an end to existing and recurring crimes for corporations, and thus the value of evidence is potentially larger than in many other settings. Correspondingly, suppressing this evidence comes at a higher cost in corporate scenarios.

Another detriment to allowing corporations to use the exclusionary rule stems from the type of evidence needed for successful corporate prosecutions, which primarily relates to the so-called collective knowledge doctrine. The idea behind this doctrine is that there can be criminal liability where the court can pool together and apply any single piece of information that any and all employees have to the corporation so the court deems the corporation to know all of it, hence forming a single mens rea.[350] This would be much more difficult to accomplish if Fourth Amendment violations against a single person could defeat all of the charges. "[I]f employee A knows one facet[,] . . . B knows another facet[,] . . . and C [knows] a third facet of [a crime], the bank knows them all."[351] If B can have the information excluded, then the government cannot prosecute the defendant (the bank in this example). Furthermore, corporations often intentionally keep information limited to discrete compartments.[352] This would make possible prosecutions even more difficult. At the end of the day, a further advantage of not allowing exclusion is the ability to minimize possible abuse of the corporate form. As judges have pointed out, there are situations in which this form may help to insulate property and protect criminal individuals.[353] If criminals are aware of possible *increased* exposure due to the corporate form, they may be less inclined to use or abuse the corporate form.

The final reason for not excluding evidence in corporate settings is only indirectly connected to the deterrent focus of the rule and rather addresses the secondary question of public perception. A number of scholars have argued that after *Leon*, some began viewing the exclusionary rule as an evaluation of the possible moral culpability of the police, which served to increase the public's confidence in the legitimacy of the law enforcement process.[354] On the other side, however, is the issue of moral condemnation in relation to corporate criminal liability.[355] Some argue that the exclusionary rule fulfills the same role in law enforcement settings as criminal prosecutions do in corporate settings, i.e., expressing condemnation.[356] Erroneous fact-finding caused by the exclusion of reliable probative evidence may affect not only the parties to the trial but

350. Cole, *supra* note 107, at 66.
351. United States v. Bank of New Eng., 821 F.2d 844, 855 (1st Cir. 1987).
352. *Id.* at 856.
353. *See, e.g.*, United States v. 7326 Highway 45 N., 965 F.2d 311, 323 (7th Cir. 1992).
354. *See, e.g.*, Taslitz, *supra* note 98, at 485.
355. *Id.* at 486.
356. *E.g.*, *id.* at 487.

also the public at large in that society could lose confidence in the court system. Therefore, even if the expression of condemnation is an important part of the role of the judiciary in this setting, this cuts both ways when it comes to the question of whether to maintain the exclusionary rule in its current form. Being able to fully express moral condemnation against the police may come at the cost of fully doing so against corporations (if evidence gets thrown out), and vice versa. Given the fact that four current Justices favorably mentioned abolishing the exclusionary rule altogether,[357] the proposal in this Article may find favorable reception in at least some courts and eventually even the Supreme Court.

C. *General Proposals to Change the Rules*

As the previous Section demonstrated, even if one concedes that the Fourth Amendment applies to corporations, that does not imply that the exclusionary rule should also apply. There are several strong arguments against having it apply or at least having it apply in the same way as to natural people. Many people thought that courts were going to completely abolish the rule in the 1970s when courts emphasized the deterrence rationale and started imposing limitations.[358] Another possibility that falls short of total elimination of the rule and that courts have employed in foreign countries would be to admit all relevant evidence but then instruct the fact finder that depending upon the circumstances, it should receive more or less weight.[359] It may not even be necessary to go this far in the corporate setting, however. Scholars have argued since at least the early 1970s that courts should limit the rule and only apply it in clearly flagrant cases.[360] Courts could adopt a similar understanding for the use of the rule in corporate criminal prosecutions today.

There have also been other proposals for limiting the exclusionary rule. One possibility would be to constrain its use to situations involving "serious crimes,"[361] but obviously this could lead to only serious criminals getting away and may not only highlight some of the costs discussed previously but also alienate public support for the rule. Some argue that when courts consider excluding evidence, they should take into account multiple factors such as the gravity of the offense relative to the extent of the law enforcement misconduct, the state of mind of the officer committing the misconduct, the location of the search (i.e., as related to the reasonable expectation of privacy), and the character of the defendant

357. Davies, *supra* note 153, at 619 (citing Hudson v. Michigan, 547 U.S. 586 (2006)).

358. *Id.* at 632–33.

359. Straschnow, *supra* note 275, at 78–79.

360. *E.g.*, *id.* at 61.

361. Cassell, *supra* note 163, at 848.

subjected to the illegal search.[362] Hence, courts can use the severity of the "substantive mistake" to determine if exclusion is appropriate.[363]

If courts adopted this type of model for corporations, courts could still exclude evidence if the circumstances were extreme. Indeed, some kinds of searches may be acceptable as a rule, but the specifics of particular cases may shock the conscience to such an extent that fundamental fairness mandates the exclusion of evidence obtained that way.[364] Some scholars point out that the Supreme Court is unlikely to apply the exclusionary rule in many contexts, except in situations that truly shock the conscience where there was a significant governmental incursion.[365] Courts could use this same type of analysis in the corporate criminal setting. The default would be that courts would admit evidence found during an illegally conducted search in a prosecution against the corporation but not admit it against any individuals, plus corporations could seek other remedies for the constitutional violation such as damages. Nonetheless, this default could be overcome if there were any particularly egregious actions (such as knowing or intentional constitutional violations, or repeated violations by a particular agency) on the part of the government, and exclusion would then apply.

CONCLUSION

This Article argues that the exclusionary rule should not apply to corporations the same way that it does to natural people. The default should consist of having any evidence discovered in violation of the Fourth Amendment admitted for purposes of prosecuting corporations. Courts should exclude this same evidence from any prosecutions against individuals involved in the criminal activity, and corporations should be free to pursue any alternative remedies that may be available. This Article shows that there are significant reasons to refuse to apply the Fourth Amendment to corporations given that it is supposed to protect personal rights that are a poor fit for artificial entities. While recognizing the Supreme Court's longstanding protection of corporations under the Fourth Amendment, this Article argues that at least the exclusionary rule need not apply to them. Corporations are more capable of protecting themselves and more likely to cause harm to others than natural persons. Further, because the Supreme Court has repeatedly stated that application of the exclusionary rule is a remedial action based on a fact-specific cost–benefit analysis and the facts about corporations weigh heavily against excluding evidence, the default rule should be that exclusion is inapplicable in the corporate setting. The quest for truth and justice

362. *E.g.*, Straschnow, *supra* note 275, at 78–79.
363. Taslitz, *supra* note 98, at 518.
364. Rosenberg, *supra* note 194, at 56.
365. *E.g.*, *id.* at 33.

should be the main goals of our judicial system, and the adoption of the proposal in this Article accomplishes both of these goals.