Controversy Over the Exclusionary Rule: Should the Criminal Go Free If the Constable Blunders?

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CONTROVERSY OVER THE EXCLUSIONARY RULE: SHOULD THE CRIMINAL GO FREE IF THE CONSTABLE BLUNDELS?

Although courts should not condone unconstitutional behavior on the part of government agents, this does not command the exclusion of evidence in every case of illegality; rather, the applicable principles must be weighed against the considerable harm that would flow from indiscriminate application of the exclusionary rule.¹

The Fourth Amendment of the United States Constitution provides that every individual shall be protected from unreasonable searches and seizures.² Notwithstanding the text of the Fourth Amendment, the homes, papers, and effects of citizens are routinely invaded.³ On those occasions where the intrusion is unwarranted, no provision in the Constitution grants a remedy.⁴ The Supreme Court, therefore, created the exclusionary rule in order to deter unconstitutional searches and seizures.⁵ The exclusionary

² U.S. CONST. amend. IV. The Fourth Amendment provides, in relevant part:
[T]he 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. Id.
³ See Boyd v. United States, 116 U.S. 616, 635 (1886), overruled by Elkins v. United States, 364 U.S. 206 (1960). The Boyd Court stated:
breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]. Id.; see also California v. Carney, 471 U.S. 386, 389 (1987) (search of motor home); T.L.O. v. New Jersey, 469 U.S. 325, 331 (1985) (search of high school student's purse); United States v. Place, 462 U.S. 696, 703 (1983) (seizure of defendant's luggage for 90 minutes outweighs law enforcement concerns); United States v. Robinson, 414 U.S. 218, 223 (1973) (search of person's cigarette packet arrested for driving without valid driver's license).
⁴ See Milton A. Lowenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L. Rev. 24, 25 (1980). The Fourth Amendment contains neither an express nor implied provision for excluding illegally seized evidence and the Supreme Court created the exclusionary rule as a mechanism for enforcing this amendment. Id. at 24; see also infra note 5 (discussing exclusionary rule as remedy designed to protect Fourth Amendment rights).
⁵ See United States v. Calandra, 414 U.S. 338, 348 (1973). The exclusionary rule is a judicially-created remedy designed to safeguard Fourth Amendment rights by deterring illegal police conduct, rather than a personal constitutional right for the party aggrieved.
rule requires that evidence recovered, as the result of an illegal search, be excluded at trial.\(^6\)

Since its inception, the exclusionary rule has engendered considerable controversy.\(^7\) It was hoped that the exclusionary rule would deter future unconstitutional conduct by law enforcement officers, by eliminating the use of illegally obtained evidence at trial.\(^8\) Recently, the controversy has been whether the exclusionary rule achieves its objective of deterring police misconduct, or

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\(^6\) See Mapp, 367 U.S. at 655-60. The Mapp Court explained that if evidence seized in violation of a defendant's Fourth Amendment rights could be used against him at trial, then the protection against unreasonable searches and seizures would be of no value. Id. Therefore, the Supreme Court held that the exclusionary rule was an essential part of the Fourth Amendment and imposed the rule in the state court. Id.

\(^7\) See Calandra, 414 U.S. at 347 (rule safeguards Fourth Amendment rights through deterrent effect); Elkins v. United States, 364 U.S. at 217 (rule's purpose to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.); Weeks v. United States, 221 U.S. at 379, 352 (1914) ("conviction by means of unlawful seizures and enforced confessions... should find no sanction in the judgments of the courts").

\(^8\) See Elkins v. United States, 364 U.S. 206, 216 (1960) (explaining possibility of hindering truth finding process); see also Donald L. Doernberg, The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. Rev. 259, 260 (1983). The author examines the tensions between the application of the exclusionary rule and Fourth Amendment concerns, suggesting a standard to be used when deciding to invoke the exclusionary rule. Id.; John E. Fennelly & Steven K. Sharpe, Massachusetts v. Shepard; When the Keeper Leads the Flock Astray—A Case of Good Faith or Harmless Error?, 59 Notre Dame L. Rev. 665, 671 (1984). Courts and commentators have stated that the exclusionary rule is an imprudent remedy which has failed its intended purpose. Id. The exclusionary rule has also been said to undermine the truth-seeking process. Id.; John Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1029 (1973-74). The exclusionary rule makes inadmissible in a defendant's criminal prosecution any evidence seized in violation of his constitutional rights. Id.; Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizures, 37 U. Chi. L. Rev. 655, 736 (1970). The possible negative effects of excluding evidence under the exclusionary rule include allowing evidence competent to prove guilt to be excluded. Id.; Teresa J. Verges, Good Faith, Reasonableness—And the Lesson of Maryland v. Garrison: Know thy Neighbor, 38 DePaul L. Rev. 517, 535 (1989). The author notes there is a great amount of debate over the exclusionary rule in the legislature and suggests the possibility of the exclusionary rule becoming obsolete. Id. at 517; Phyllis T. Bookspan, Note, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 473 (1991). The Supreme Court has struggled to balance the protection of the Fourth Amendment against the loss of incriminating evidence and conviction of the guilty. Id. This ongoing battle is evident in five specific developments of Fourth Amendment law: a narrowing definition of what constitutes a search; standing thresholds; denial of federal habeas corpus review of Fourth Amendment violations; the expansion of exceptions to the warrant requirement; and a free form reasonableness analysis. Id.
whether it unnecessarily suppresses valuable evidence that causes criminals to go free. 

Part One of this Note traces the origins of the exclusionary rule and reviews the minimum standards established by the Supreme Court. Part Two examines how New York courts have inconsistently applied the exclusionary rule and the detrimental effect this has had on law enforcement's ability to predict what will be permissive conduct. In addition, Part Two reviews how other states have utilized the exclusionary rule more prudently. Lastly, Part Three suggests reforms and proposals that provide a basis for consistent application of the exclusionary rule.

I. THE ORIGINS OF THE EXCLUSIONARY RULE

The genesis of the exclusionary rule is traced to three early cases. Boyd v. United States, involved a forfeiture proceeding where the government sought discovery of certain invoices in the defendant's possession. The Supreme Court excluded evidence which was obtained by an order of production, that compelled the defendant to turn over the invoices. Although Boyd was a civil case, and a search by police was not involved, the Court dis-

9 See supra note 5 (discussing exclusionary rule as safeguard of Fourth Amendment rights); see also Stone v. Powell, 428 U.S. 465, 496-506 (1975) (exclusionary rule imposes tremendous costs on society and does not protect judicial integrity or deter official misconduct); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) ("there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials"); Coolidge v. New Hampshire, 403 U.S. 443, 491 (1971) ("[T]he assumed deterrent value of the exclusionary rule has never been adequately demonstrated. . . .").


12 Boyd, 116 U.S. at 638. To prove fraud, the United States Attorney offered an order directing the claimant to produce the invoice of the 29 cases of plate glass, in order to show that defendant was attempting to evade the payment of import tax. Id.

13 Id. at 638. The Court stated that the United States Attorney's order to produce defendant's invoices was unconstitutional and should be excluded because failure to produce would lead to the equivalent of a confession, and that would be the same as ordering their production. Id.

14 Id. at 617. The Boyd Court dealt with the seizure and forfeiture of property against 35 cases of plate glass. Id. Defendants altered invoices so as to defraud the government of import tax. Id. Section 12 of the Act of June 22, 1874, entitled "An Act to Amend Customs Revenue Laws" declared that one "shall for each offense be fined in any sum not exceeding $5000 nor less than $50 . . . ." Id.
cussed the Fourth Amendment's protection against unreasonable searches and seizures. Justice Joseph P. Bradley declared that a right to privacy existed in one's personal papers and documents, and the steps taken to obtain the defendant's invoices were unreasonable and violated his Fourth Amendment rights.

Eighteen years after the Boyd decision, the Supreme Court seemed to contradict itself in Adams v. New York. In Adams, the defendant was convicted of possessing gambling paraphernalia, after private papers were seized from his premises without his consent. The Adams Court held that evidence, even if obtained illegally, was effective to establish guilt regardless of its source.

In Weeks v. United States, the Supreme Court re-established...
the exclusionary rule. In *Weeks*, the defendant was convicted of illegal gambling. On appeal, the defendant argued that documents used as evidence in his trial were illegally obtained, and his Fourth Amendment rights were violated. The Court concluded that the evidence was illegally obtained and had to be returned to the defendant.

Although the exclusionary rule mandated that illegally seized evidence be returned, the rule did not address whether a defendant could suppress the use of that evidence at trial. In *Silverthorne Lumber Co. v. United States*, the defendant's office

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22 See *Weeks*, 232 U.S. at 398. The *Weeks* Court stated:

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant . . . [and] the court should have restored these letters to the accused. . . . In holding them and permitting their use upon trial, we think prejudicial error was committed.

Id.; see also 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, 1374 (1983) (stating that 10 years later it became clear Adams was “just a wild turn in the exclusionary rule roller coaster track”).

23 *Weeks*, 232 U.S. at 386. Police officers were led into defendant's house by a neighbor and without a warrant. *Id.* The police searched the defendant's room and took possession of various papers, including letters and stock certificates. *Id.*

24 *Id.* at 389. The defendant argued that the papers had been obtained by entering his home without a search warrant and therefore violated his Fourth and Fifth Amendment rights. *Id.* at 389-90.

25 *Id.* at 393. The *Weeks* Court explained that while the efforts of the courts and law enforcement officials to bring the guilty to justice were praiseworthy, they could not be accomplished at the expense of an individual's constitutional right. *Id.* The Court further stated:

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

Id.


28 251 U.S. 385 (1920).
was searched, and books and papers were seized while the defendants were detained at their residence. The Supreme Court concluded that a rule which prohibited a certain means of obtaining evidence should also provide that such evidence not be used during a trial.

A. The Standard Established for States

In Wolf v. Colorado, the Supreme Court addressed the issue of whether state courts had to apply the exclusionary rule when there was a Fourth Amendment violation. The Wolf Court held that if a state could provide a remedy that would deter unconstitutional police conduct, as equally effective as the exclusionary rule, the exclusionary rule would not have to be utilized. However, the dissent argued that no other effective remedy existed. Justice Frank Murphy stated that there was only one alternative to the exclusionary rule, and that was, to have no sanction at all.

In Mapp v. Ohio, the Supreme Court finally mandated state

29 Id. at 390-91.
30 Id. at 392. The Silverthorne Court concluded that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id. However, the Court also stressed a limitation that if evidence was obtained by an independent source it could be used. Id. However, if the evidence was gained by the government's own misconduct, the evidence could not be used at trial. Id.; see also Agnello v. United States, 269 U.S. 20, 27 (1925). The Agnello Court took a substantial step forward in applying the exclusionary rule to different types of evidence. Id. at 27-34. The defendant sought to suppress a container of cocaine seized by revenue agents after a planned "sting" operation. Id. The Court held a person may invoke the protection of the Fifth Amendment, and demand the return of the item seized where an illegal seizure occurred in violation of the Fourth Amendment. Id. Therefore, the defendant was entitled to the demand the return of the cocaine, since allowing to be admitted would violate his Fifth Amendment right. Id.
32 See id. at 25. Justice Felix Frankfurter, writing for the majority, explained that the issue was whether a state was required to exclude evidence under the Fourteenth Amendment because it obtained in manner that would have required it suppression in a federal court under the Fourth Amendment. Id. at 25-26.
33 Id. at 33. The Wolf Court stated: "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." Id. The Fourth Amendment never expressed a remedy that must be applied. Id. Therefore, the Fourteenth Amendment does not require that states apply a remedy that the federal courts have chosen. Id. at 33-34.
34 Id. at 41 (Murphy, J., dissenting). Justice Frank Murphy eloquently stated: "Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system." Id.
35 Mapp, 367 U.S. at 41. Justice Murphy explained: "there is but one alternative to the rule of exclusion. That is no sanction at all." Id.
application of the exclusionary rule. In *Mapp*, Dollree Mapp was convicted of possessing obscene magazines and photographs after police officers entered her home without a warrant. While the Supreme Court of Ohio admitted the illegally seized evidence, the Supreme Court of the United States mandated that the evidence be excluded from trial. The Supreme Court explained that the Fourth Amendment's right to privacy was enforceable against the states, through the Fourteenth Amendment, and therefore an implied remedy had been forged for Fourth Amendment violations.

Since the *Mapp* decision, the Supreme Court has established exceptions to the exclusionary rule. For instance, in *United States v. Calandra*, the Supreme Court explained that a witness summoned to appear before a grand jury could not decline to answer questions on the basis that his identity was the evidence obtained

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37 *Id.* at 660. Writing for the majority, Justice Tom C. Clark stated: "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice."

38 *Mapp*, 367 U.S. at 644. Police officers responded to a tip that a person, who was wanted for questioning in a recent bombing, was hiding out at a certain location. *Id.* When the officers sought entrance to the house, Ms. Mapp refused. *Id.* The officers advised headquarters and began surveillance. *Id.* The officers, after being joined by more officers, forced themselves in and gained entry. *Id.*

39 *Id.* at 645-46. The state court explained that even if the evidence was obtained unlawfully, the Fourteenth Amendment did not mandate that the evidence be excluded at trial in light of the *Wolf* decision. *Id.*

40 *Mapp*, 367 U.S. at 660. Just as the Fourth Amendment is applicable to the states through the Fourteenth Amendment, so is any judicially created remedy for the Fourth Amendment. *Id.*


42 See infra notes 43-46 (discussing exceptions to exclusionary rule).

in violation of the Fourth Amendment.\textsuperscript{44} In addition, in \textit{Wong Sun v. United States},\textsuperscript{45} the Supreme Court explained that evidence obtained in a manner so attenuated from a Fourth Amendment violation would not be subject to the exclusionary rule.\textsuperscript{46}

\section*{II. New York's Application of the Exclusionary Rule}

Although a state may afford a defendant greater rights and protection under its own constitution than the United States Supreme Court has bestowed under the Federal Constitution,\textsuperscript{47} 371 U.S. 471 (1963).

44\textsuperscript{Id.} at 340-41. A warrant was issued in connection with an extensive investigation of suspected illegal gambling operations, for the purpose of searching for the location of gambling books. \textit{Id.} While the search of defendant's place of business revealed no gambling books, FBI agents recovered promissory notes indicating payments to John Calandra. \textit{Id.} The agents contacted the United States Attorney's office for the Northern District of Ohio, regarding the possibility of extortionate credit transactions. \textit{Id.} A grand jury subpoenaed Calandra for questioning. \textit{Id.} Mr. Calandra appeared, and refused to testify, invoking his Fifth Amendment right. \textit{Id.; see also} People v. Young, 55 N.Y.2d 419, 424, 434 N.E.2d 1068, 1071, 449 N.Y.S.2d 701, 704 (1982) (acknowledging exclusionary rule never interpreted to preclude use of all illegally seized evidence in all proceedings or against all persons); People v. Pleasant, 76 A.D.2d 244, 246, 430 N.Y.S.2d 592, 593 (1st Dep't 1980) (explaining exclusionary rule not extended to grand jury proceedings or evidence used to impeach defendant); Rosado v. McGuire, 114 Misc. 2d 652, 656, 452 N.Y.S.2d 277, 280 (N.Y. County Ct. 1982) (court refused to extend exclusionary rule to Fourth Amendment challenges to grand jury witness's questions and subpoenas); People v. McGrath, 86 Misc. 2d 249, 255, 380 N.Y.S.2d 976, 983 (N.Y. County Ct. 1976) (stating there was no right to immediate suppression hearing for grand jury witness who refused to answer questions based on Fourth Amendment violation).

45\textsuperscript{Id.} at 491. Wong Sun gave an unsigned confession after he was arrested for violations of federal narcotics laws. \textit{Id.} The arrest lacked probable cause, and the Supreme Court declared the confession attenuated, and therefore admissible, because Wong Sun had voluntarily returned several days later to make the statement. \textit{Id.; see also} People v. Towns, 41 N.Y.2d 97, 102, 359 N.E.2d 402, 406, 390 N.Y.S.2d 893, 897 (1976) (pulling and firing gun at police officer render any connection between unlawful conduct and discovery of evidence attenuated); People v. Gluckowski, 174 A.D.2d 752, 753, 571 N.Y.S.2d 336, 337 (2d Dep't 1991) (videotaped statement in which defendant admitted to punching and stabbing girlfriend was attenuated because given voluntarily and after being read Miranda warnings); \textit{cf.} People v. Figueroa, 122 Misc. 2d 631, 634, 471 N.Y.S.2d 986, 988 (N.Y. County Ct. 1984) (line-up immediately following warrantless arrest not attenuated to allow admission at trial).

46\textsuperscript{Id.} at 491. See People v. Sundling, 395 N.W.2d 308, 314 (Mich. Ct. App. 1986). The Sundling court stated that under the Michigan and United States constitutions, illegally seized evidence generally must be suppressed. \textit{Id.} at 313. In this case, the court stated that although the United States Supreme Court had adopted a good faith exception to the exclusionary rule, the Michigan courts would not. \textit{Id.} The court held that it was a state's right to give a defendant greater rights under its own constitution than the United States Supreme Court had given under the United States Constitution. \textit{Id.} at 314; \textit{see also} United States v. Calandra, 414 U.S. 338, 340 (1974). The Calandra Court held "the exclusionary rule should be restricted to those areas where its remedial objectives are...most efficaciously served." \textit{Id.} For lower courts which have interpreted this holding expansively, not allowing the use of any illegally seized evidence in any criminal proceeding, \textit{see} United States v. Graves, 758 F.2d 870, 874 (10th Cir. 1986) (illegally obtained evidence not allowed at sentencing hearing); United States v. Hill, 447 F.2d 817, 822 (7th Cir. 1970) (illegally obtained evidence not allowed at probation hearings); United States v. Fitzpatrick, 426 F.2d 1161, 1165 (2d Cir.
New York has not always chosen to apply the exclusionary rule exceptions espoused by the Supreme Court. In People v. Rogers, the New York Court of Appeals held that the exclusionary rule would only be applied if the challenged evidence was closely tied to the illegal arrest. The Court of Appeals admitted the evidence, since the relation of the police conduct to the evidence, was so insignificant that suppressing the evidence was no longer justified.

In People v. Johnson, the defendant gave two voluntary statements regarding his arrest for murder after he had been given his Miranda warnings. The Court of Appeals explained that

1970 (illegally obtained evidence not allowed at parole revocation hearing); People v. Smith, 360 N.W.2d 841, 842 n.2 (Mich. 1984). The Smith court held that there were no policy decisions that command the use of a test proffered by the Supreme Court over one set out by the state. Id. "It is true that this court cannot interpret a similar provision in the Michigan constitution less liberally than the United States Supreme Court interprets the United States Constitution, but the opposite is true." Id.


50 Id. at 532, 421 N.E.2d at 496, 439 N.Y.S.2d at 100. In Rogers, the defendant was convicted of felony murder. Id. The victim, a woman, was stabbed in the throat and abdomen, dragged along the sidewalk, and into an alleyway where, while dying, she was raped. Id. The primary issue of the case was whether admissions made by the defendant to the police following his arrest, which lacked probable cause, were properly admitted into evidence. Id. at 530, 421 N.E.2d at 493, 439 N.Y.S.2d at 98.

Even though, at the trial, there was overwhelming evidence of the guilt of defendant, because of confessions he made after his arrest, the information the police possessed at the time the defendant was arrested did not constitute probable cause for arrest. Although improper, the court held the arrest was designed to hold the defendant, and after admissions were made by the defendant, the detention was supported by probable cause. Id. at 534, 421 N.E.2d at 497, 439 N.Y.S.2d at 101; see also Nardone v. United States, 308 U.S. 338, 341 (1939). The Nardone Court held that facts improperly obtained would not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like others, but the knowledge gained by the courts own wrong cannot be used by it simply because it is used derivatively." Id. (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); see also Wong Sun v. United States, 371 U.S. 471, 471 (1963). In Wong Sun, the Court stated that at some point the chain of causation is broken and the original illegal activity did not bar the admission of evidence obtained thereafter. Id. at 471.

51 Rogers, 52 N.Y.2d at 532, 421 N.E.2d at 496, 439 N.Y.S.2d at 100. The Rogers court also held that the evidence challenged was the product of a source independent of the defendant's detention, and concluded that the police did not exploit the illegal detention of defendant to produce his incriminating statements. Id.; see also Silverthorne, 251 U.S. at 392 (challenged evidence product of independent source and police did not exploit illegal detention); People v. Martinez, 37 N.Y.2d 662, 670, 339 N.E.2d 162, 167, 376 N.Y.S.2d 469, 474 (1975) (focusing on reasonableness of factual basis for police action and motive at root of action when evaluating propriety of police conduct).


53 Id. at 399, 488 N.E.2d at 441, 497 N.Y.S.2d at 619. Defendant was convicted of felony
although the defendant was illegally arrested, the prosecution could prove that statements made were acquired by means sufficiently distinguishable from the illegal arrest, and therefore admissible despite the illegality of the arrest.\textsuperscript{54} The court held that the relevant consideration was whether an intervening event broke the causal connection between the arrest and the defendant’s statements.\textsuperscript{55} Intervening events include the temporal proximity of the arrest and confession, and the purpose and flagrancy of the official misconduct.\textsuperscript{56} Because, in this case, the prosecution failed to prove that an intervening event purged the taint of illegality, the court granted the motion to suppress.\textsuperscript{57}

\textbf{A. New York’s Inconsistent Application of the Exclusionary Rule}

New York courts are unpredictable in their application of the exclusionary rule.\textsuperscript{58} In \textit{New York v. Harris},\textsuperscript{59} the United States Supreme Court ruled that the New York Court of Appeals incor-

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\item[54] Id. at 399, 488 N.E.2d at 439, 497 N.Y.S.2d at 619. The defendant claimed that two statements he made after his arrest were improperly received into evidence because he was arrested without probable cause, and the statements he made were products of his unlawful arrest. Id. at 400, 488 N.E.2d at 441, 497 N.Y.S.2d at 620.
\item[55] Johnson, 66 N.Y.2d at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624. In Johnson the defendant was arrested unlawfully when police acted solely upon hearsay information given to them by another suspect. Id. The Johnson court held that the defendant’s statements made after his illegal arrest were tainted by the arrest, and since the arrest was not purged by any intervening event, the evidence was suppressed. Id.
\item[56] Id. at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624. The court explained that the relevant considerations were “[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct.” Id. at 409, 488 N.E.2d at 448, 497 N.Y.S.2d at 428 (citing \textit{Brown v. Illinois}, 422 U.S. 590, 603-04 (1975)); see also \textit{Taylor v. Alabama}, 457 U.S. 687, 689-92 (1982) (“a confession obtained through interrogation after an illegal arrest, should be excluded unless intervening events break the connection so that the confession is an act of free will, no longer part of the primary illegality”); \textit{Dunaway v. New York}, 442 U.S. 200, 216-19 (1971) (defendant seized without probable cause and statements made during illegal detention not sufficiently attenuated to permit use at trial).
\item[58] See \textit{People v. Sierra}, 190 A.D.2d 202, 206, 599 N.Y.S.2d 6, 8 (1st Dep’t 1993) (judges and lawyers disagree when confronted with specific cases about what circumstances give rise to sufficient suspicion to justify pursuit of suspect); \textit{People v. Rivera}, 175 A.D.2d 78, 80, 572 N.Y.S.2d 327, 330 (1st Dep’t 1991) (officer’s pursuit of defendant justified after officer observed hand movements between defendant and another man, and defendant immediately ran upon officer’s approach). \textit{But see People v. Holmes}, 181 A.D.2d 27, 30, 585 N.Y.S.2d 718, 719 (1st Dep’t 1992) (police officer’s observation of defendant, in known drug location, with bulge in pocket, and defendant’s flight upon officer’s attempt to question him not justify pursuit of defendant).
\item[59] 495 U.S. 14 (1990).
\end{itemize}
rectly suppressed the defendant's confession made at a police precinct. The Supreme Court held that although the police arrested the defendant without a warrant, probable cause existed because of various facts the police obtained, including the body of the victim. The exclusionary rule, therefore, did not bar the use of the defendant's statement. On remand, the Court of Appeals rejected the Supreme Court's analysis and suppressed the statement. The Court of Appeals explained that although admissible under federal standards, the defendant's statement would be suppressed under New York law because the evidence was obtained from illegal entry of defendant's dwelling.

The Court of Appeals in *Harris* was incorrect in suppressing the confession made at the precinct. Although citizens must be afforded protection from illegal police conduct, Harris had already received this protection when the statement he made in his home to the police was suppressed. The *Harris* decision was an excessive use of the exclusionary rule because there was no police misconduct. Particularly, the defendant was read his Miranda rights on several occasions, and an hour passed after he was brought to the precinct and confessed a second time. The *Harris* decision,

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60 Id. at 21-22; see also People v. Harris, 77 N.Y.2d 434, 439, 570 N.E.2d 1051, 1055, 568 N.Y.S.2d 702, 706 (1990). In *Harris*, police went to the defendant's apartment in search of him and after they knocked on the door and identified themselves, the defendant let the police into his apartment. *Id.* at 439, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706. While drinking wine, he told police he killed his girlfriend. *Id.* An hour later at the precinct, after being given his Miranda rights, the defendant confessed for a second time. *Id.* at 440, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707. The court suppressed his first statement, under *Payton v. New York*, 445 U.S. 573 (1980), because defendant was arrested without a warrant. *Id.*

The rule espoused in *Payton v. New York*, protected against warrantless arrests in a person's dwelling. See *Payton*, 445 U.S. at 575. The *Payton* rule is that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home if police have effected a warrantless and nonconsensual entry into a suspect's home in order to make an arrest. *Id.*

61 *Harris*, 495 U.S. at 21.

62 *Id.* at 21. The police had probable cause, developed during the five days between the crime and the arrest. *Id.*; see also People v. Harris, 77 N.Y.2d 434, 446, 570 N.E.2d 1051, 1056, 568 N.Y.S.2d 702, 710 (1991). The trial court in New York found at the suppression hearing that "the police station statement was sufficiently an act of free will to purge the taint of the unlawful invasion." *Id.* The court further held that the "taint resulting from an illegal arrest was removed by the lapse of time between the statements and the rereading of the Miranda warnings." *Id.*

63 *Harris*, 77 N.Y.2d at 443, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708.

64 *Id.* at 437, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705. The Court of Appeals suggested that the Supreme Court's rule did not adequately protect the rights of citizens of New York. *Id.*

65 *Id.* at 439, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (arguing Fourth Amendment right already protected and any other exclusion unnecessary).

66 *Id.*
therefore, complicates the ability of the police to detect and apprehend criminals because although the attenuation element had been satisfied, the court still suppressed the evidence. The confusion that has plagued the New York courts is also evident in People v. Oeller and People v. Peguero.

In People v. Oeller, two police officers observed the defendant purchase what appeared to be illegal narcotics. The officers approached the defendant, and ordered him to take his hands out of his pockets. Upon doing so, several vials of crack cocaine fell to the ground. The New York State Appellate Division, First Department, upheld the trial court's decision not to suppress the evidence. Because the defendant was observed in an area known

See People v. Sierra, 190 A.D.2d 202, 204, 599 N.Y.S.2d 6, 7 (1st Dep't 1993). The Sierra court held that a defendant's flight, coupled with an officer's prior belief that criminal activity was afoot, was sufficient to provide the officers with justification to pursue and detain the fleeing individual. Id. The court stated: "this analysis comports with the reality of these rapidly escalating street encounters. Holding to the contrary merely serves to frustrate effective law enforcement without providing any greater level of protection to the citizenry, against unlawful intrusions upon their privacy." Id. at 208, 599 N.Y.S.2d at 11.

Under the exclusionary rule, courts are called upon to evaluate the propriety of police officer conduct in their approach, pursuit, and arrest of individuals they suspect are involved in criminal activity. See supra note 5 (discussing purpose of exclusionary rule); see also People v. DeBour, 40 N.Y.2d 210, 215, 352 N.E.2d 562, 568, 386 N.Y.S.2d 375, 379 (1976). The DeBour court established a four-tier method for evaluating the propriety of an encounter initiated by a police officer. Id. The four-tier method included: (1) the police officer's right to request information of individuals must be supported by an objective, credible reason, not necessarily indicative of criminality; (2) the police officer's right to inquire which is "activated by a founded suspicion that criminal activity is afoot and permits somewhat greater intrusion"; (3) where the officer believes that a person has committed, is about to commit, or is involved in a crime, the officer is authorized to forcibly stop and detain that person; and (4) if the police officer has probable cause to believe that a person has committed a crime, an arrest is authorized. Id. at 223, 352 N.E.2d at 573, 386 N.Y.S.2d at 386.

However for criticism of DeBour, see People v. Hollman, 79 N.Y.2d 181, 183, 590 N.E.2d 204, 206, 581 N.Y.S.2d 619, 620 (1992). The Hollman court commented on the DeBour standards: "Becausethe terms on their face are so close in meaning, the legal significance we intended each to have has become obscured and the result has been inconsistency in the evaluation of markedly similar police encounters." Id. at 185, 590 N.E.2d at 209, 501 N.Y.S.2d at 622; see also Sierra, 190 A.D.2d at 204, 599 N.Y.S.2d at 8 (stating strict application of DeBour principles generated discussion by fostering unrealistic approach to rapidly escalating street encounters).


People v. Oeller, 191 A.D.2d at 356, 595 N.Y.S.2d at 193. The police officer testified that in 4 years of service, he had made 25 arrests, and assisted in over 100 others, involving illegal narcotics in the location where defendant was arrested. Id.

Id. The officer believed the defendant was in possession of narcotics and therefore ordered him to remove his hands from his pockets. Id.

Id. at 356, 595 N.Y.S.2d at 193.

Id. at 357, 595 N.Y.S.2d at 194. The court held that police had more than "a founded suspicion that criminal activity was afoot." Id. (citing People v. DeBour, 40 N.Y.2d 210, 215, 352 N.E.2d 562, 568, 386 N.Y.S.2d 375, 379 (1976)).
for drug activity, and the officers had observed the defendant ex-
change money for an item, reasonable suspicion existed that the
defendant committed a crime.\textsuperscript{74}

In \textit{People v. Peguero},\textsuperscript{75} police officers observed what was be-
lieved to be a drug transaction.\textsuperscript{76} When the defendant saw the po-
lice officers approach, he ran and threw seven vials of crack co-
caine to the ground.\textsuperscript{77} At the suppression hearing, the police
officers testified that they observed the defendant in the same
area on ten prior occasions, and several unidentified informants
told them that the defendant sold drugs.\textsuperscript{78}

Although the facts were similar to \textit{Oeller}, the \textit{Peguero} court sup-
pressed the evidence because the police officers did not have the
requisite reasonable suspicion necessary to pursue and stop the
defendant.\textsuperscript{79} If factors indicative of criminality are present, a New
York court should not suppress the evidence discovered.\textsuperscript{80} In \textit{Oel-
ler} and \textit{Peguero}, factors indicative of criminality including, a
known drug area; a witnessed exchange of an item for money; and
the nervous reaction of the defendants when approached by police,
existed.\textsuperscript{81} Using a common-sense appraisal of the entire circum-

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{74}] People v. Oeller, 191 A.D.2d 355, 356, 595 N.Y.S.2d 192, 193 (1993). The court ex-
plained the police had heightened suspicion when the other participant in the drug trans-
action ran while they approached and there was an exchange of money for an object “in an
area rampant with narcotics activity.” \textit{Id.} at 358, 595 N.Y.S.2d at 195.
\item[\textsuperscript{76}] \textit{Id.} The police officer observed the defendant facing another individual and noticed
them “making movements” amongst themselves. \textit{Id.} The officer then observed the defend-
ant accept money from the other individual. \textit{Id.}
\item[\textsuperscript{77}] \textit{Id.} The court held that the flight of the defendant served to heighten police suspicion.
\textit{Id.} This, combined with the exchange of currency for an object “in an area rampant with
narcotics activity, . . . negated all but the most implausible explanations for the transac-
tion.” \textit{Id.}
\item[\textsuperscript{78}] \textit{Id.} An unspecified number of unidentified individuals stated to police that defendant
had told them “he also sells.” \textit{Id.}
\item[\textsuperscript{79}] \textit{Id.} The court concluded that at the time the defendant fled, the officer did not have
the requisite reasonable suspicion necessary to pursue and stop him. \textit{Id.} The court held
that the drugs that the defendant threw away during the case must be suppressed because
they were “discarded as a spontaneous reaction to the sudden and unexpected pursuit by
the officers and not as an independent act, involving a calculated risk attenuated from the
underlying police conduct.” \textit{Id.} (quoting People v. Holmes, 181 A.D.2d 27, 29, 585 N.Y.S.2d
718, 720 (1st Dep't 1992)).
1993). Factors indicative of criminality included rented car with out-of-state plates, double
parked, in location known for sale of narcotics to out-of-state residents. \textit{Id.} Police checked
defendant’s license after a traffic infraction and discovered a marijuana cigarette and a
nine millimeter pistol became visible. \textit{Id.}; see also People v. Rogers, 52 N.Y.2d 527, 535, 421
circumstances necessary when determining whether exclusionary rule applies).
\item[\textsuperscript{81}] See supra notes 74 & 76 (discussing factors present and indicative of criminality).
\end{itemize}
\end{footnotesize}
stances, these factors establish reasonable suspicion. If New York courts consistently applied these factors indicative of criminality, police officers would be certain of permissible search and seizure conduct.\textsuperscript{82}

**B. Other States' Application of the Exclusionary Rule**

New York should follow a more conservative application of the exclusionary rule, which has been established by several states.\textsuperscript{83} In *State v. Harper*,\textsuperscript{84} the Tennessee Supreme Court denied a motion to suppress evidence.\textsuperscript{85} The *Harper* court held that the totality of the circumstances provided police reasonable suspicion to search the defendants' automobile.\textsuperscript{86} The police officers had conducted a long-term drug investigation at the house where the defendants were arrested.\textsuperscript{87} The police, through routine investigation, knew that drugs were being brought to the house by out-of-state residents.\textsuperscript{88} These factors, therefore, establish the reasonable suspicion which supported the police officer's actions.

In *State v. Ostroski*,\textsuperscript{89} the Connecticut Supreme Court denied a motion to suppress a confession.\textsuperscript{90} The defendant was arrested without probable cause, but confessed to stabbing to death a
nineteen-year-old woman after being interrogated.\textsuperscript{91} He was then convicted for murder based on the confession, and evidence obtained by the illegal interrogation.\textsuperscript{92} The court held that the defendant's confession was sufficiently attenuated from the primary illegality.\textsuperscript{93} The court explained that thirty-six hours had passed between the illegal arrest and the confession.\textsuperscript{94} This attenuation, combined with the fact that police did not pressure the defendant into confessing, were sufficient intervening events that broke the causal connection, and removed the taint of illegality from the initial Fourth Amendment violation.\textsuperscript{95}

III. Exceptions and Reforms to the Exclusionary Rule

New York's inconsistent and excessive application of the exclusionary rule exemplifies the need for judicial modification.\textsuperscript{96} New York courts must provide a consistent standard for application of the exclusionary rule. Such a standard must ensure that Fourth Amendment rights are not infringed upon, that public safety is protected, and that the truth-finding process is enhanced. Several applications have been used which would strengthen New York's exclusionary rule.\textsuperscript{97}

\textsuperscript{91} Id. at 921. The court held that the inquiry turned on the application of the "fruit of the poisonous tree" doctrine. This doctrine rests on the theory that once there is police misconduct, evidence that is obtained as a result of this conduct is tainted and should be barred from use. Id. The Ostroski court explained that the evidence was admissible because it was sufficiently attenuated from the primary illegality. Id. at 922.

\textsuperscript{92} Id. at 916. The defendant was charged with the murder of a 19-year-old woman. Id.

\textsuperscript{93} Id. at 922. The court explained that the following factors would be used to ascertain whether the confession was obtained by the exploitation of the illegal arrest: the "temporal proximity" of the illegality and the challenged evidence; "the presence of intervening circumstances"; and "particularly, the purpose and flagrancy of the official misconduct." Id. at 922 (quoting Brown v Illinois, 422 U.S. 590, 603-04 (1975)).

\textsuperscript{94} Ostroski, 518 A.2d at 919.

\textsuperscript{95} Id. at 922.

\textsuperscript{96} See, e.g., Charles D. Levine, The Second Circuit Constricts the Applicability of the Exclusionary Rule, 50 BROOK. L. REV. 799, 821 (1986); Keith A. Fabi, Comment, The Exclusionary Rule: Not the "Expressed Juice of the Wolly-Headed Thistle", 35 BUFF. L. REV. 937, 944 (1986). The sole remaining justification for the exclusionary rule is to act as a deterrent against police misconduct. Id. The author postulated that the best mechanism for accomplishing this goal would be to set up statutory exclusionary rules which would establish a bright-line rule and minimize judicial discretion. Id. In Tirado v. Commissioner, 460 U.S. 1014 (1983), the Second Circuit allowed the IRS to use evidence, illegally obtained by local law enforcement officials, which was excluded at an earlier trial. Id. The decision was based on the premise that the two agencies were so distant that the purpose of the exclusionary rule, to deter police misconduct, was furthered, and therefore, not necessary. Id.

\textsuperscript{97} See infra notes 102 & 123 and accompanying text (discussing plain touch doctrine as corollary of established plain view doctrine and revised reasonable suspicion definition).
A. The Plain Touch Doctrine

A Fourth Amendment violation occurs when evidence is obtained by an officer performing a search without a warrant or probable cause. A warrantless search is per se unreasonable and violates the Fourth Amendment's right to be free from unreasonable search and seizures. However, there are exceptions which allow for a warrantless search. These exceptions range from a search and seizure incident to arrest to evidence in plain view. This latter exception has led commentators to suggest the applica-

98 See Mapp v. Ohio, 367 U.S. 643, 648 (1961). Any conduct by an officer who forcefully extorts a man's private papers or testimony is within the condemnation of the Fourth Amendment. Id.; see also United States v. Place, 462 U.S. 696, 701 (1983) (seizure of personal property per se unreasonable unless accomplished pursuant to judicial warrant); Payton v. New York, 445 U.S. 573, 584 (1980). The Court explained that many courts and commentators had argued that the Fourth Amendment was drafted in response to the "general warrant," which was a one or two line warrant granting broad power. Id. The Payton Court further explained that the "evil" the Fourth Amendment was designed to prevent was much broader than the general warrant, and was to encompass situations when no warrant existed. Id.; United States v. Chadwick, 433 U.S. 1, 1 (1977) (fundamental purpose of Fourth Amendment is to safeguard individuals from unreasonable government intrusions).

99 See Katz v. United States, 389 U.S. 347, 348 (1967). The petitioner was convicted of transmitting wagering information by telephone in violation of federal statute. Id. The issue addressed was whether a telephone booth was a constitutionally protected area. Id. Although, the Court stated that the Fourth Amendment protected people and not places, the Court concluded that any search without a warrant was unlawful. Id. at 357.

100 See N.Y. Const. art. 1, § 12. Section 12 provides, in pertinent part:
[T]he 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.

Id.; see also N.Y. Const. art. 1, § 12 commentary (McKinney 1993). The commentary provides, in pertinent part:

Exceptions to the rule requiring a warrant for search include, consensual searches, seizure of contraband and evidence of crime in plain view, search and seizure incident to arrest, search and seizure of property lawfully in possession of police based on probable cause or for safeguarding of property, and search and seizure of automobile based on exigency provided there is probable cause.

Id.; see also People v. King, 193 A.D.2d 1075, 1075, 598 N.Y.S.2d 879, 880 (4th Dep't 1993) (search of defendant's automobile was valid because police lawfully arrested defendant after chase); People v. Suarez, 187 A.D.2d 620, 620, 589 N.Y.S.2d 930, 931 (2d Dep't 1992) (discovery of gun while frisking defendant after apprehended for operating stolen vehicle; because discovery was incident to arrest, no warrant required); People v. Williams, 181 A.D.2d 474, 475, 581 N.Y.S.2d 21, 22 (1st Dep't 1992) (exigent circumstances, such as open door and officers arriving with victim, justified warrantless search of apartment where rape had just occurred).


[T]here are over twenty exceptions to the probable cause or the warrant requirement or both. They include searches incident to arrest, which are exceptions to both probable cause and a warrant, to airport searches, which are also exceptions to both a warrant and probable cause.

Id.; see also supra note 100 (discussing exceptions to exclusionary rule such as plain view, exigent circumstances, and automobile searches).
tion of the plain touch doctrine as an extension of plain view.\textsuperscript{102}

In \textit{United States v. Williams},\textsuperscript{103} the United States Circuit Court of Appeals for the District of Columbia held that a plain touch exception would exist as an extension of the plain view doctrine.\textsuperscript{104} The plain touch doctrine provides that evidence, which can be discerned with reasonable certainty by an officer's legal touching, would not be subject to a warrant requirement.\textsuperscript{105} The plain touch doctrine is supported by two theories. First, the intrusion into one's privacy by a brief touch is a de minimis cost as compared to the benefit.\textsuperscript{106} The second theory maintains that probable cause arises once there has been a lawful touching, and an officer unequivocally determines that contraband is present.\textsuperscript{107}


\textsuperscript{103} 822 F.2d 1174 (D.C. Cir. 1987).

\textsuperscript{104} Id. at 1184. The \textit{Williams} court explained: "[i]n light of this authority, we endorse even more strongly our earlier conclusion in \textit{Russell}, that no warrant is needed for an opening of a container whose contents become known through a lawful touching of the outside." \textit{Id.}; see also \textit{United States v. Russel}, 670 F.2d 323, 325 (D.C. Cir. 1982) (plain view exception encompasses plain touch and probably plain smell, based on idea that incriminating contents immediately apparent); \textit{United States v. Ocampo}, 650 F.2d 421, 428 (2d Cir. 1981) (where contents of container are easily discernible, expectation of privacy slight); \textit{Walker v. State}, 610 A.2d 728, 728 (Del. 1992) (seizure of cocaine from defendant's pocket within scope of search because officers concluded with reasonable certainty that pocket contained contraband).

\textsuperscript{105} See \textit{Williams}, 822 F.2d at 1184 (seizure of paper bag containing controlled substance is justified after defendant attempted to conceal it and officers were able to discern contents with reasonable certainty); \textit{United States v. Portillo}, 633 F.2d 1313, 1316 (9th Cir. 1980) (because contents of paper bag were apparent from outward feel of container, appellants did not possess reasonable expectation of privacy in paper bag); see also supra note 104 (discussing situations where contents of containers discernable with reasonable certainty).

\textsuperscript{106} See \textit{supra} note 102 (noting that courts must balance nature and quality of intrusion into individual's Fourth Amendment interests and importance of governmental interests alleged to justify intrusion if Fourth Amendment interest at stake); see also Kevin A. Lantz, Note, \textit{Search and Seizure: The Princess and the Rock, Minnesota Declines to Extend Plain View to Plain Feel}, 18 U. Dayton L. Rev. 539, 560 (1993) (outlining process for balancing individual interests against societal or governmental interests when determining reasonableness of intrusion).

\textsuperscript{107} See \textit{United States v. Ocampo}, 650 F.2d 421, 421 (2d Cir. 1981). The \textit{Ocampo} court explained:

Where the contents of a container are easily discernible by frisking the exterior of a package, there is little likelihood that the owner could reasonably expect any substantial degree of privacy. Under such circumstances it would be a pointless formality to require that the agents first obtain a warrant before examining the contents. \textit{Id.}; see also Haselkorn, \textit{supra} note 102, at 695 (providing where officers feel object in course of legitimate police conduct, and this provides probable cause for further search and
1. The De Minimis Cost to the Individual

The plain touch doctrine is supported because a brief touching is a minimal intrusion into one's privacy as compared to the benefit, which in most instances, is an enhanced truth-finding process. The validity of this theory is analogous to the Terry search. In Terry v. Ohio, the issue was whether law enforcement officers could momentarily detain an individual, and perform a brief frisk to ensure the safety of the officers, if there was reasonable suspicion of criminal activity. The Terry Court concluded that the brief search of an individual was a petty indignity which was justifiable to further the interest of effective law enforcement.

Despite the holding in Terry, this rationale is not a sound basis on which to create a plain touch doctrine. First, the cost or inconvenience to the citizen is greater because the search is more intrusive. In Terry, while the intrusion was a pat-down to if the individual was in possession of a weapon, a more intrusive search would be necessary to determine if illegal contraband is present. While only a brief feel would be necessary to determine if an individual possessed a weapon, a person's pockets would have to be manipulated to discover if any contraband was possessed by

seizure, further intrusion need not be authorized by warrant); Holtz, supra note 102, at 529 (arguing that it does not matter whether probable cause flows from an officers sense of sight, touch, or some other sense); Iverson, supra note 102, at 109 (arguing probable cause established no information leading to conclusion perceived).

108 See supra note 106 and accompanying text (discussing cost to individual minimal compared to benefit of enhanced fact-finding process).

109 See Terry v. Ohio, 392 U.S. 1, 30 (1967). A search was permitted to allow an officer to discern if an individual possessed any weapons which would put the officer's life in risk. Id. at 5-12. Two men were observed by a police officer walking back and forth past a store window, as if they were preparing to burglarize the establishment. Id. Later, a third man arrived at the scene and proceeded to do the same. Id. Suspecting that the men were planning a robbery, the officer followed them until they stopped and rejoined the third man. Id. The officer approached the trio, asked for identification, at which time the officer frisked the defendant for weapons. Id.

110 Id. at 10. The Terry Court stated: "In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." Id.

111 See supra note 107 (discussing plain touch doctrine).

112 See Terry, 392 U.S. at 13 (police officer frisked defendant after suspecting that defendant intended to commit robbery).

113 See Haselkorn, supra note 102, at 694 (arguing that sense of touch open to more interpretations); Holtz, supra note 102, at 536 (feeling for weapon is far less intrusive than attempting to ascertain if contraband present); Lantz, supra 106, at 545 (discerning if contraband present in individual's pocket could require kneading and rubbing which is far more intrusive).
the detainee.\textsuperscript{116}

2. The Escalation of a Lawful Touching to Probable Cause

An alternative approach provides that probable cause arises if a lawful touching occurs and an officer with reasonable certainty, determines that illegal narcotics exist.\textsuperscript{117} However, the initial touching must be lawful.\textsuperscript{118} This scenario would occur most commonly during a Terry pat-down search, where an officer entertains reasonable suspicion of criminality.\textsuperscript{119}

The second requirement would be that, during the touching, the officer discerned with reasonable certainty that contraband existed.\textsuperscript{120} However, this requirement has been criticized.\textsuperscript{121} While, it has been argued that the sense of touch is less reliable than the sense of sight, courts could make a factual determination by considering the officer's experience.\textsuperscript{122} This factor, along with the use

\textsuperscript{116} See State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992) ("It is quite something else to pinch, squeeze and rub the suspect's pocket to see what might be inside."); State v. Rhoades, 788 P.2d 1380, 1381 (Okla. 1990) (approving use of evidence of offense unrelated to weapons would invite use of weapons' searches as pretext for unwarranted searches); Commonwealth v. Marconi, 597 A.2d 616, 621 (Pa. 1991) (plain view doctrine associated with seizures not searches, and to create plain touch doctrine for searches yields another erosion to Fourth Amendment warrant requirement).

\textsuperscript{117} See supra note 107 (discussing lawful touching could result in ripening of probable cause).

\textsuperscript{118} Cf. Williams, 822 F.2d at 1184 (plain touch only applies where officer legally authorized to touch container in first place); United States v. Ocampo, 650 F.2d 421, 428 (D.C. Cir. 1981) (initial stop and frisk justified after identity of defendant became known as individual who had just completed cocaine purchase); Walker v. State, 610 A.2d 728, 728 (Del. 1991) (defendant's flight and character as drug dealer gave necessary fear for police officers to perform frisk in order to discern if weapons present).

\textsuperscript{119} See Terry v. Ohio, 392 U.S. 1, 12 (1967) (explaining police officer may perform cursory frisk of individual if believed that life in danger and criminality present).

\textsuperscript{120} Id. at 1184 (contents of package not deemed in plain view unless lawful touching convinces officer to reasonable certainty that container holds contraband or evidence of crime); see also United States v. Russell, 670 F.2d 323, 323 (D.C. Cir. 1982) (contents in question immediately apparent upon lawful touching); Ocampo, 650 F.2d at 428 (contents of container easily discernible by frisking exterior of package).

\textsuperscript{121} See infra note 122 (discussing sense of touch less reliable than sense of sight and therefore open to more interpretations).

\textsuperscript{122} See State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992) (deciding sense of touch inherently less immediate and reliable than sense of sight and therefore declined to extend plain view doctrine to sense of touch); Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. 1991) (stating amount of drugs on defendant so minute that impossible to identify through sense of touch).
of hindsight to determine if the object could have been discerned with reasonable certainty, would support a police officer's search.\(^{123}\)

A majority of states, including New York, have refused to adopt the plain touch doctrine.\(^ {124}\) New York, however, should adopt the plain touch doctrine because probable cause may arise after a police officer has made a lawful touching. Although at inception probable cause may not exist, if an officer makes a legal touching based on reasonable suspicion and discerns that contraband exists, probable cause would be established.

B. The Good Faith Exception

In United States v. Leon,\(^ {125}\) the Supreme Court established the “good faith” exception to the exclusionary rule.\(^ {126}\) The Leon Court explained that when a police officer acted in good faith, and with reasonable reliance upon a defective warrant, evidence obtained would not be excluded.\(^ {127}\) Similar to the plain touch doctrine, the good faith exception has been criticized.\(^ {128}\) Some commentators believe that courts should not penalize an officer, who acted in “good faith,” since the purpose of the exclusionary rule is to deter

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\(^{123}\) See supra note 120 (court could make factual determination by considering if officer could discern object with reasonable certainty).

\(^{124}\) See, e.g., State v. Collins, 679 P.2d 80, 85 (Ariz. 1983) (to approve use of evidence of some offense unrelated to weapons would invite use of weapons' searches as pretext for unwarranted searches, and thus, severely erode protection of Fourth Amendment); Dunn v. State, 382 So. 2d 727, 729 (Fla. 1980) (expressly limiting Terry rationale to language); Dickerson, 481 N.W.2d at 845 (court contends sense of touch inherently less reliable than sight); State v. Rhodes, 788 P.2d 1380, 1381 (Okla. 1990) (confining scope of Terry to offensive weapons); Marconi, 597 A.2d at 631 (noting plain view associated with seizures and not searches); State v. Broadnax, 654 P.2d 96, 100 (Wash. 1982) (search violates guarantee of Fourth Amendment, which protects persons against unreasonable intrusions on part of all governmental agents).


\(^{126}\) Id. at 922 (stating exclusionary rule never intended to be absolute and if its purpose—to deter police misconduct—would not be furthered, it should not be used).

\(^{127}\) Leon, 468 U.S. at 922 (explaining that primary purpose of exclusionary rule is to deter police misconduct, and therefore, no need to exclude evidence when police officer acted in good faith upon defective warrant, because then there is no conduct to deter).

\(^{128}\) See 2 LAFAVe, supra note 27, at § 1.3. In support of his argument against the good faith doctrine, Professor LaFave stated: "[W]e have not been treated to an honest assessment of the merits of the exclusionary rule, but instead have been drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand." Id. (quoting United States v. Leon, 468 U.S. 897, 905 (1984) (Brennan, J., dissenting)). But see Rosemarie A. Lynskey, A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Reduction Doctrine with United States v. Leon, 41 VAND. L. REV. 811, 824 (1988). The author stated that the good faith exception is moot because the threshold for probable cause was diminished after Gates. Id.
police misconduct.\textsuperscript{129} Other critics argue that an officer would be tempted to ignore the validity of a warrant if the officer knew that acting in good faith would be a sufficient basis for admitting any evidence discovered.\textsuperscript{130}

Writing for the majority, Justice Byron White stated that the cost of having evidence excluded should be balanced against the benefit of having such evidence included.\textsuperscript{131} Specifically, the cost of losing valuable evidence which hinders the truth-finding process as compared to the benefit of discouraging police misconduct. Justice White explained that in the case where a law enforcement officer acted in good faith while executing a warrant, the validity of the warrant was irrelevant, and the benefits of admitting the evidence outweighed the costs.\textsuperscript{132} Justice White reasoned that since the purpose of the exclusionary rule was to deter police misconduct, there was no misconduct to deter if an officer acted in good faith, and thus the evidence should be admitted.\textsuperscript{133}

This rationale is flawed because to admit unlawfully seized evidence, in order to aid in the truth-finding process, would make the "judiciary become a part of what is in fact a single governmental action prohibited by the terms of the [Fourth] [A]mendment."\textsuperscript{134} Additionally, the good faith exception overlooks a type of conduct sought to be deterred. If an officer knows that so long as he acts in good faith upon a warrant, that any evidence discovered will not

\textsuperscript{129} See supra note 127 (discussing no conduct to deter if officer acts in good faith).

\textsuperscript{130} See id.

\textsuperscript{131} See United States v. Leon, 468 U.S. 897, 909-10 (1984). The Leon Court stated: "[I]t does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.'" Id. (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)). The Court went further and explained that sometimes benefits to persons aggrieved by the introduction of damaging evidence unlawfully obtained would not outweigh its costs. Id. (citing Alderman, 394 U.S. at 174-75).

\textsuperscript{132} Leon, 468 U.S. at 921 (explaining validity of warrant plays no part in officers execution of it, rather officers good faith should be commended rather than condemned).

\textsuperscript{133} See Leon, 468 U.S. at 921. The Court explained that it would be the magistrate's duty to decide whether probable cause existed. Id. Once an officer receives the warrant, there is really no opportunity to question the magistrate's findings. Id. The only real duty is to execute the warrant. Id. Furthermore, Justice White explained that cases had consistently held that when the exclusionary rule was rigidly applied, the result was to hinder the truth-finding process. Id.

\textsuperscript{134} Id. at 933. The Leon Court stated:

[It is difficult to give any meaning at all to the limitations imposed by the [Fourth] Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirement.

\textit{Id.} at 933-34.
be suppressed, the warrant's soundness is irrelevant, and the officer will fail to obtain valid warrants.  

Since the Leon decision in 1984, eleven states, including New York, have rejected the good faith exception, while twelve states have adopted the Leon holding. The remaining states have either refused to decide this issue, or have failed to unequivocally accept or reject the Leon rationale. These remaining states should apply New York's more prudent approach and reject the good faith exception to the exclusionary rule.

C. The Existence of Reasonable Suspicion

In People v. DeBour, the New York Court of Appeals defined police conduct that would be appropriate in response to different situations arising during an officer's course of duty. The DeBour court adopted the Terry rationale, and held that if a police officer entertained a reasonable suspicion that a particular person was involved in criminal activity, he could detain the individual, and briefly frisk the person if the officer felt that he was in physi-

135 See supra note 128 (discussing misconduct sought to be deterred having officer seek valid warrant rather than being unconcerned with soundness).


141 Id. at 223, 352 N.E.2d at 574, 386 N.Y.S.2d at 386. The Debour court stated: Various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence... Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person. A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is danger of physical injury by virtue of the detainee being armed.

Id.
Although Terry established this test, inconsistencies exist in the New York courts as to what constitutes reasonable suspicion.

In People v. Cantor, the New York Court of Appeals defined reasonable suspicion as the “quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand.” The first element necessary to establish reasonable suspicion is the “quantum of knowledge.” The court must review the quantity or amount of the police officer’s knowledge present at the time of the street encounter. This knowledge could be an awareness of being in a drug prone neighborhood, or observation of a person in flight. While each factor may not be conclusive by itself, the courts should be mindful of the aggregate of factors.

The second element requires the court to determine how an ordinarily prudent and cautious person would perceive the circumstances. Although a reasonable person test is applied, courts should recognize that police officers have a greater exposure to everyday street encounters, and their perception towards a situation may be different than that of an ordinarily prudent person.

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142 Id. (intrusion by brief search minimal compared to benefit received by allowing police officer to ensure his safety).
144 Id. at 108, 324 N.E.2d at 874, 365 N.Y.S.2d at 511. In order for the courts to approve a police officer’s suspicion that criminality was at hand, a police officer must indicate specific facts, which, along with any logical deduction, would reasonably prompt an intrusion into an individuals privacy. Id. Good faith and “mere hunches” will not suffice. Id. at 113, 324 N.E.2d at 877, 365 N.Y.S.2d at 514.
145 Id. at 112-13, 324 N.E.2d at 879, 365 N.Y.S.2d at 515 (describing quantity of knowledge measured in deciding if officer had reasonable suspicion).
146 See Cantor, 36 N.Y.2d at 113, 324 N.E.2d at 850, 365 N.Y.S.2d at 515. The Cantor court concluded that there was no evidence in the record which indicated that the officers had knowledge of criminal activity. Id. The court noted there was no independent knowledge from an informer to indicate a crime had been committed, nor were there any observation of defendant participating in any criminal act. Id.; see also People v. Adams, 194 A.D.2d 102, 105, 605 N.Y.S.2d 120, 123 (3d Dep’t 1993) (explaining officer had sufficient knowledge to fulfill need for reasonable because defendant’s vehicle was reported stolen); People v. Williams, 603 N.Y.S.2d 516, 518 (2d Dep’t 1993) (revealing that back up officers justifiably relied on radio transmissions of fellow officers describing seller, which resulted in reasonable suspicion).
147 See supra note 146 (discussing situation where officer had articuable facts and knowledge to support reasonable suspicion that criminality was afoot).
149 See Terry v. Ohio, 392 U.S. 1, 24 (1967) (police should be given great deference in their evaluation of street encounters because officer’s knowledge differs from that of lay person); People v. Gray, 90 A.D.2d 405, 406, 457 N.Y.S.2d 125, 126 (stating eight and one-half years of experience enabled officer to believe that criminal activity was afoot); see also
Greater deference should therefore be given to a law enforcement officer's perception, and a revised ordinarily prudent person test should be used.\footnote{150}

**CONCLUSION**

No one search and seizure is ever identical to another. Likewise, an officer's conduct in executing a warrant is never the same. Since the utilization of the exclusionary rule will always be fact-specific, it seems difficult to imagine there ever being a bright-line test for the courts to adopt. However, the adoption of the plain touch doctrine and a clarified definition of reasonable suspicion will move New York courts to a fairer and clearer utilization of the exclusionary rule, while preserving the purpose of deterring police misconduct.

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\footnote{150}{See supra note 146 (stating that police officer's experience is unique quality and, accordingly, should be given great deference).}