Chapter 2

The Exclusionary Rule and Other Remedies

CHAPTER OVERVIEW

A *remedy* is a method of rectifying wrongdoing. When a person believes he or she has been harmed in some way, that person may seek relief from the harm, or make the person who caused the harm "pay" for the damage done. A remedy is thus an enforcement mechanism for violations of people's rights. Criminal procedure cannot be fully appreciated without some discussion of the remedies that may be used to cure constitutional rights violations.

Remedies may be legal or extralegal in nature. *Extralegal* remedies are those conducted outside the legal process. An example of an extralegal remedy is vigilantism. If one man is assaulted by another, the assaulted individual may seek revenge and opt to solve the perceived injustice with his fists. *Legal* remedies are remedies made available by the law, by court decisions, or by a police policy or procedure.

The bulk of the discussion in this chapter is on remedies for constitutional rights violations. The most frequently discussed remedy in criminal procedure is the *exclusionary rule*. This rule is a creation of the courts and is not found in any statutes.

The first section of this chapter discusses the exclusionary rule and the so-called "fruit of the poisonous tree" doctrine. The second section covers exceptions to the exclusionary rule. The following section touches on criminal remedies other than the exclusionary rule, notably state and federal law. This section also looks at *civil remedies* that are sought by filing lawsuits. The chapter closes with a discussion of *non-judicial remedies*, including internal review, civilian review, and mediation.

CHAPTER OBJECTIVES

1. Summarize the exclusionary rule.
2. Describe exceptions to the exclusionary rule.
3. Summarize the "fruit of the poisonous tree" doctrine and the exceptions to it.
4. Describe criminal prosecution and civil remedies for constitutional rights violations.

LECTURE OUTLINE

The Exclusionary Rule

Considered the most significant remedy in criminal procedure, it requires that evidence obtained in violation of the Constitution cannot be used in a criminal trial to prove guilt.

The history of the exclusionary rule. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that business records should have been excluded because a compulsory production of the private books and papers of the owner compelled him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search-and-seizure—and an unreasonable search-and-seizure—within the meaning of the Fourth Amendment.

In *Weeks v. United States*, 232 U.S. 383 (1914), the Court relied solely on the Fourth Amendment as a basis for exclusion. Without a warrant, police entered the home of Fremont Weeks and seized documents that tied him to criminal activity. The Court held that the documents were seized in violation of the Fourth Amendment and should have been returned to Weeks.

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), a similar set of circumstances was presented. Silverthorne allegedly avoided paying taxes. Without a warrant, federal agents seized documents from him and made copies. The Court declared that authorizing such activities would encourage law enforcement to circumvent the Constitution. Justice Holmes stated that without an enforcement mechanism, "the Fourth Amendment [is reduced] to a form of words" and little else.

In *Elkins v. United States*, 364 U.S. 206 (1960), the Court denounced the so-called "silver platter" doctrine, which permitted the use of evidence in *federal* court that had been obtained illegally by *state* officials.

A turning point: *Mapp v. Ohio.* In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court decided that the exclusionary rule applied to the states. It concluded that other remedies, such as reliance on the due process clause to enforce Fourth Amendment violations, had proven "worthless and futile."

In *Ker* v. *California*, 374 U.S. 23, the Court decided that federal standards must be applied when determining whether the exclusionary rule should apply. States can also apply more restrictive procedures for evaluating admissibility of evidence, but they cannot relax the Mapp standard.

In *Cady v. Dombrowski*, 413 U.S. 433, the Court decided that evidence obtained in violation of a state rule or law that is not of a constitutional dimension need not be excluded under Mapp. It may, however, be excluded under state law.

Applicability of the exclusionary rule beyond the fourth amendment. Some people believe that because the Fourth Amendment contains no specific reference to what should happen when an improper search or seizure takes place, the purpose of the exclusionary rule is to enforce the Fourth Amendment. Some observers argue that evidence can still be excluded because of Fifth, Sixth, and even Fourteenth Amendment violations. The perspective adopted in this book is that the exclusionary rule applies across the board.

When the exclusionary rule does not apply. The exclusionary rule does not apply in following four situations: grand jury investigations, *habeas corpus* proceedings, parole revocation hearings, and civil proceedings.

Exceptions to the Exclusionary Rule

The Supreme Court has seen fit to allow evidence in cases involving honest mistakes as well as other circumstances. There are two exceptions to the exclusionary rule: (1) the "good faith" exception and (2) the impeachment exception.

Good faith exception. As a general rule, when an honest mistake is made during the course of a search or seizure, any subsequently obtained evidence will be considered admissible. The "good faith" exception was announced in two related cases: *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

Impeachment exception. In some cases, evidence that has been excluded as direct evidence of guilt may be used for the purpose of impeachment (attacking the credibility) of a witness. This is known as the impeachment exception. The impeachment exception was upheld in *Walder v. United States*, 347 U.S. 62 (1954).

- Teaching Note: An important limit on the impeachment exception is that it applies only to the impeachment of criminal defendants, not other witnesses. This restriction was established in *James v. Illinois*, (493 U.S. 307 [1990]).

The "Fruit of the Poisonous Tree" Doctrine

In the "fruit of the poisonous tree" doctrine, the "poisonous tree" is the initial unconstitutional search or seizure. Anything obtained from the tree is considered "forbidden fruit" that should be excluded. The doctrine was first announced by the Supreme Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

The Silverthorne holding was reaffirmed in the case of *Nardone v. United States*, 308 U.S. 338 (1939), a case in which illegally intercepted phone messages formed a vital component of the prosecution's case. The Supreme Court noted that it should be left to the discretion of "experienced trial judges" to determine whether "a substantial portion of the case against [the accused] was a fruit of the poisonous tree."

Exceptions to fruit of the poisonous tree. There are three main exceptions to the fruit of the poisonous tree doctrine. They are purged taint, independent source, and inevitable discovery.

The "*purged taint*" exception to the fruit of the poisonous tree doctrine is also known as the *attenuation exception.* In Nardone, Justice Frankfurter observed that in some cases, "sophisticated argument may prove a causal link obtained through [illegality] and the government's proof. As a matter of good sense, however, such a connection may have become so attenuated as to dissipate the taint."

The *independent source* exception was first established in *Segura v. United States*, 468 U.S. 796 (1984). In that case, police requested a search warrant to search an apartment based on information they received from a suspect about a drug sale.

The *inevitable discovery* exception states that if evidence would be found regardless of unconstitutional police conduct, then it is admissible. This exception was first recognized by the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984).

Alternative Remedies

Criminal law. At the federal level, the most common statute for holding police officers criminally liable is 18 U.S.C. Section 242. Section 242 is to criminal liability what Section 1983 is to civil liability. It can be used to prosecute either a state or a federal law enforcement officer.

To be held liable under Section 242, a law enforcement officer must act with specific intent to deprive a person of important constitutional (or other federal) rights (*Screws v. United States*, 325 U.S. 91 [1945]).

For criminal liability to be imposed under Section 242, a constitutional right must be clearly established (*United States v. Lanier*, 520 U.S. 259 [1997]).

Police officers often engage in many actions that would be crimes if performed by ordinary citizens. However, they enjoy immunity from criminal liability for these actions, if the actions are committed (justifiably) as part of their official duties. On these occasions, police officers are shielded from criminal liability by the law enforcement or public duty defense to criminal liability. Beyond the public duty defense, police officers do not have much in the way of defense against criminal liability.

Civil litigation. When a person's constitutional or other federal civil rights are violated, that person can bring a lawsuit in civil court.

> **42 U.S.C. section 1983.** 42 U.S.C. Section 1983 provides a remedy in federal court for the "deprivation of any rights . . . secured by the Constitution and laws" of the United States. One of the requirements for a successful Section 1983 lawsuit is that the defendant, the person being sued, acted under color of law. The Supreme Court has stated that someone acts under color of law when he or she acts in an official capacity (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 [1982]).
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> Situations in which officers act under color of law
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> - They have identified themselves as officers.
> - They are performing a criminal investigation.
> - They have filed official police documents.
> - They are making an arrest.
> - They are invoking police powers in or outside their jurisdiction.
> - They are settling a personal vendetta with police power.
> - They are displaying weapons or police equipment.
>
> The second requirement for a successful Section 1983 lawsuit is that a constitutional rights violation has taken place. The plaintiff must establish that the defendant's conduct violated a specific constitutional provision, such as the Fourth Amendment. Not all constitutional rights violations are (or should be) actionable under Section 1983. Recently, the courts have required that constitutional rights violations alleged under Section 1983 be committed with a certain level of culpability. That is, the plaintiff generally has to prove that the defendant officer intended for the violation to occur.

- Teaching Note: Discuss with students what the purpose of *civil litigation* is. Aside from sometimes being the only remedy available, civil lawsuits are attractive because money can be awarded. The *plaintiff*, or the person filing the lawsuit, seeks payment for injuries or perceived injuries suffered, known as *damages*. In addition to damages, the plaintiff can also seek *injunctive relief*, which basically

means he or she wants the Court to bring the injurious or offensive action to a halt.

Municipal/county liability. Cities and counties can also be held liable under Section 1983, particularly if they adopt and implement policies or adopt customs that become responsible for constitutional rights violations. In general, a plaintiff will not succeed with a Section 1983 municipal/county liability claim if lower-ranking officials who have no authority to make policy in the traditional sense of the term engage in a common practice.

Defending against wrongful litigation. Officials who are sued under Section 1983 can assert a qualified immunity defense. Qualified immunity is a judicially created defense, just like the exclusionary rule is a court creation. In some cases, qualified immunity is more than a defense; it may afford immunity from suit.

Similar to the Fourth Amendment's test for reasonableness, an objective reasonableness standard has been applied in order to determine if qualified immunity should be extended to criminal justice officials who are defendants.

Qualified immunity thus affords protection to defendant criminal justice officials not just for reasonably mistaken beliefs, but for any number of actions that are objectively reasonable under the circumstances—viewed from "the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight"

Non-judicial remedies. Three non-judicial remedies are available for police misconduct. First, an *internal review* is a process by which a police department investigates complaints against its own officers. Typically, an internal affairs division takes up this task. The second remedy, *civilian review,* is a mechanism by which private citizens serve in some capacity to review complaints of police misconduct. Not to be confused with civilian review, *mediation* asks an objective third party, such as an ombudsman, to resolve a grievance between a police officer and a citizen who complains of wrongdoing.

Internal review. Many police agencies have developed innovative and highly respected internal review mechanisms.

Civilian review. A study of citizen complaints against police has identified three distinct forms of the process: (1) civilian review; (2) civilian input; and (3) civilian monitor. Pure *civilian review* is the strongest form—a civilian panel investigates, adjudicates, and recommends punishment to the police chief. The second strongest form is *civilian input.* In this form, a civilian panel receives and investigates a complaint, leaving adjudication and discipline to the department itself. The weakest of the three, the *civilian monitor* form, leaves investigation, adjudication, and discipline to the department, but a civilian is allowed to review the adequacy and impartiality of the process.

Mediation. Relying on a neutral third party to render decisions is the most desirable approach to address the problem of police misconduct. In mediation, a neutral third party, or ombudsman (sometimes called a "mediator" or "arbitrator"), recommends a decision.

LIST OF CHANGES/TRANSITION GUIDE

A new chapter-opening story features the Supreme Court's decision in Plumhoff v. Rickard , a high speed pursuit case in which the families of two slain motorists sued police on the theory they used excessive force. The chapter was also updated with the latest decisions involving remedies for constitutional rights violations.

ADDITIONAL ASSIGNMENTS AND CLASS ACTIVITIES

Activity 1: Have each student find a popular example of the extralegal remedy vigilantism and present these to discuss in class.

Activity 2: Ask the students to write a summary of how the "Fruit of the Poisonous Tree" Doctrine could have played a negative role in the Boston bombing investigation.

ANSWERS TO "THINK ABOUT IT" EXERCISES

An Act of Good Faith?

Answer

This exercise places something of a twist on the "good faith" exception announced in *Arizona v. Evans* in that it deals with reliance on information provided by other police officers. The Supreme Court has been hesitant to permit a "good faith" defense in such situations. Instead, the Court has favored first determining whether the information that leads to the warrant, and ultimately the police bulletin, withstands Fourth Amendment scrutiny. In *Whiteley v. Warden* (401 U.S. 560 [1971]), the case on which this example is based, the Court held that "[t]he complaint, which did not mention that the sheriff acted on an informer's tip, and which consisted of no more than the sheriff's conclusion that the individuals named committed the offense, could not support the independent judgment of a disinterested magistrate" (p. 560). In other words, all the evidence should have been excluded at trial.

The Independent Source

Answer

It depends on whether probable cause to obtain a warrant existed prior to and independent of the initial warrantless entry. According to the Supreme Court in *Murray v. United States* (487 U.S. 533 [1988]), the case on which this example is based:

> Although the federal agents' knowledge that marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry, it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry, the independent source doctrine allows the admission of testimony as to that knowledge. This same analysis applies to the tangible evidence, the bales of marijuana. . . . The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or if information obtained during that entry was

> presented to the Magistrate and affected his decision to issue the warrant. (p. 533)

Incidentally, this case was remanded to the district court to determine whether the independent source exception should be applied.

Color of Law

Answer

In *Costa v. Frye* (138 Pa. Commw. 388 [1991]), the case on which this example is based, the plaintiffs' lawsuit against the city did not succeed. Here is what the court said:

> Frye [the real name of the defendant officer] participated in a private argument over the use of a poker machine. The fact that the argument escalated to the point where Frye believed it was necessary to draw his gun does not transform the incident into a police matter. Frye's involvement in the fight and response to violence were not an exercise of some power bestowed upon him by the City. Clearly, Frye's conduct cannot be characterized as actions which were made possible only because Frye was a police officer. The City did not require Frye to carry his gun while off-duty and he did not properly assert any authority as a police officer during the altercation. The evidence presented at trial demonstrates that Frye was engaged in a purely private incident which cannot be fairly attributed to the City. We conclude that Frye was not acting under the color of state law while participating in a barroom brawl. (p. 393)

Municipal Liability

Answer

No. First, no police agency would adopt a formal policy permitting the use of excessive force. Thus, the real issue is the frequency with which events like the one in question have taken place. In fact, the beating was an isolated incident. But even if the plaintiffs could show that this was a common practice, the city would not necessarily be held liable. For that to happen, the practice must have been sanctioned by those high-ranking officials responsible for policymaking. As one court noted, official policy is

> [1] A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
> [2] A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined. (*Webster v. Houston*, 735 F.2d 838 [5th Cir. 1984], p. 841)

The Fourth Amendment and Qualified Immunity

Answer

At first, this may seem to be a reasonable decision. But at second glance, after paying special attention to what tests are used to determine Fourth Amendment reasonableness (as well as whether qualified immunity should be granted), a paradox seems evident. The Court basically stated that the officers in this case acted unreasonably with regard to the Fourth Amendment, but because the law in this area was not clearly established, given the limited number of guiding precedents, the officers acted reasonably. Reading between the lines, the Supreme Court sees nothing wrong with declaring certain police conduct to be "reasonably unreasonable."

SUGGESTED ANSWERS TO END-OF-CHAPTER ASSIGNMENTS

1. What is the exclusionary rule?

The exclusionary rule requires that evidence obtained in violation of the Constitution cannot be used in a criminal trial to prove guilt. This rule is not found anywhere in the wording of the Constitution. As a general rule, evidence obtained in violation of either the Fifth or Sixth Amendment will be excluded at a criminal trial.

2. Is the exclusionary rule applicable beyond the Fourth Amendment? Explain.

Yes. As a general rule, evidence obtained in violation of either the Fifth or Sixth Amendment will be excluded at a criminal trial. Whenever law enforcement violates one or more of the Fourth, Fifth, Sixth, and Fourteenth Amendments—the most common amendments in criminal procedure—the evidence resulting from such a violation will not be admissible in a court of law.

3. What are the two exceptions to the exclusionary rule?

The "good faith" exception and the impeachment exception.

4. Which exception has the most relevance to police officers.

The "good faith" exception pertains to police officers. The impeachment exception applies only to the impeachment of criminal defendants, not other witnesses. This restriction was established in *James v. Illinois*, (493 U.S. 307 [1990]).

5. Define the "fruit of the poisonous tree" doctrine.

The "fruit of the poisonous tree" doctrine is the initial unconstitutional search or seizure. Anything obtained from the tree is considered "forbidden fruit" that should be excluded.

6. What are the three exceptions to the fruit of the poisonous tree doctrine?

Three exceptions:

- Purged Taint. The "purged taint" exception to the fruit of the poisonous tree doctrine is also known as the attenuation exception.

- Independent Source. The independent source exception was first established in *Segura v. United States*, 468 U.S. 796 (1984).
- Inevitable Discovery. The inevitable discovery exception states that if evidence would be found regardless of unconstitutional police conduct, then it is admissible.

7. How does the criminal law operate as a remedy?

Various statutes at the federal and local levels provide criminal remedies for police violations of constitutional rights. Some states make it a criminal offense for police officers to trespass or to falsely arrest people. In fact, most criminal sanctions that apply to ordinary citizens also apply to police officers. Likewise, various statutes at the federal level make it not only improper but also criminal for police officers to engage in certain types of conduct.

8. How does civil litigation act as a remedy?

Civil litigation is sometimes being the only remedy available, civil lawsuits are attractive because money can be awarded. The plaintiff, or the person filing the lawsuit, seeks payment for injuries or perceived injuries suffered, known as damages. In addition to damages, the plaintiff can also seek injunctive relief, which basically means he or she wants the Court to bring the injurious or offensive action to a halt.

9. What are the requirements for a successful Section 1983 lawsuit?

The concept of color of law is a requirement for any successful Section 1983 claim. One of the requirements for a successful Section 1983 lawsuit is that the defendant, the person being sued, acted under color of law. The Supreme Court has stated that someone acts under color of law when he or she acts in an official capacity (*Lugar v. Edmondson Oil Co*., 457 U.S. 922 [1982]).

One of the requirements for a successful Section 1983 lawsuit is that the defendant, the person being sued, acted under color of law. The Supreme Court has stated that someone acts under color of law when he or she acts in an official capacity (*Lugar v. Edmondson Oil Co*., 457 U.S. 922 [1982]). Typically, in Section 1983 cases, the plaintiff ’s lawsuit will target an individual officer, that officer’s supervisor, the city or municipality for which the officer works, or any combination of each.

10. Compare and contrast three non-judicial remedies.

Internal Review - Process by which a police department investigates complaints against its own officers

Civilian Review - Involving citizens at some stage of the complaint review process

Mediation - Relying on a neutral third party to render decisions