CORPORATE CRIMINAL PROSECUTIONS AND THE EXCLUSIONARY RULE

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For well over half a century, the legal system has chosen to exclude some of the most probative evidence possible from criminal trials when the evidence was obtained in contravention of the Fourth Amendment. This policy of exclusion is based on a perceived greater need to protect U.S. citizens from governmental abuses than to convict all criminals. Meanwhile, during the same time period in which exclusion of evidence has taken place, the government has consistently increased the level of criminal enforcement against corporations. The government regularly promotes the idea that corporations are dangerous if left unchecked and that, hence, there is a strong need for criminal prosecutions as well as new laws and increased penalties. Therefore, on the one hand, the government has increased its pursuit of criminal corporations, and on the other hand, it excludes from prosecutions the evidence most likely to lead to convictions. This Article examines the possible tension between these two policies. The examination begins with an overview of the ways in which corporations are treated as "people" in court and are often entitled to constitutional rights as well as the ways in which corporate criminal prosecutions have arisen and are currently conducted. This Article then studies the so-called exclusionary rule and its origins as a judicial doctrine that seeks to protect the rights granted under the Fourth Amendment. The argument demonstrates that corporations may not be entitled to Fourth Amendment protection at all even though they currently do receive it. As part of its analysis, this Article examines both the contemporary explanations and historical backdrop for the exclusionary rule. None of the traditional justifications for the exclusionary apply effectively to corporations. When it comes to deterrence, the costs of excluding reliable information are higher in the corporate than the individual setting and the benefits are lower. Operating within the Supreme Court's requirement that a fact-specific cost-benefit analysis should be conducted in every case to determine if evidence should be excluded, this Article concludes that in the vast majority of corporate criminal cases, the exclusionary rule should not apply. This Article proposes that courts should adopt a default rule that all reliable evidence should be admitted against corporate defendants regardless of its provenance.

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I. Introduction *3*
II. Corporate Criminal Liability *3*
A. The Framework of Corporate Criminal Liability 3
B. Corporations and Personhood 8
C. The Purpose of Corporate Criminal Liability 11
D. Achieving the Goals of Corporate Criminal Liability 13
III. The Exclusionary Rule *15*
A. The History of the Exclusionary Rule 15
B. Arguments Supporting the Exclusion of Evidence 18
C. Arguments Against the Exclusion of Evidence 20
IV. The Exclusionary Rule and Corporations *24*
A. The Fourth Amendment and Corporations 24
B. Applying the Exclusionary Rule to Corporations 27
C. General Proposals to Change the Rules 31
V. Conclusion *32*

I. Introduction

The Fourth Amendment of the United States Constitution establishes for all Americans the right to be secure in their persons and property from unreasonable searches and seizures.[1] One of the primary ways in which this right is protected today is via the so-called exclusionary rule. This rule establishes that when evidence is obtained in an unconstitutional manner, it will not be used to establish the guilt of the individuals whose rights were infringed.[2] This Article argues that the exclusionary rule should not apply with equal force to corporations as to natural people. In making this argument, this Article examines the distinctions between natural people and corporations, including information relating to corporate recidivism rates and the inherent limitations of corporate criminal penalties. This Article studies the history of both the Fourth Amendment itself and of the exclusionary rule, as well as the Supreme Court's jurisprudence in that area. The conclusion of this analysis is that the unique characteristics of a corporation and the different costs and benefits of excluding illegally obtained evidence from corporate prosecutions indicate that the rule should not be applied in the traditional manner in these settings. This Article specifically argues that reliable but unconstitutionally obtained evidence should be allowed in criminal prosecutions against corporations. Meanwhile, this same evidence should not be used against natural people who are also prosecuted in connection with the same criminal activity, and corporations should be able to pursue any non-exclusion-based remedy available for the constitutional infringement.

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

II. Corporate Criminal Liability

A. The Framework of Corporate Criminal Liability

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

[1] U.S. CONST. amend. IV.
[2] *See, e.g.*, Weeks v. United States 232 U.S. 383 (1914).
[3] *See* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 415 (2012); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does*

if not the most, respected early legal scholar, William Blackstone, believed that the correctness of this state of affairs was "so obvious that it needed no elaboration."[4] In 1701, American courts addressed the question and held that only individuals could be charged criminally.[5] Eventually, in the early part of the twentieth century, the United States Supreme Court finally established corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*[6] and used the respondeat superior principle to determine guilt. A corporation can now be held criminally liable for almost any crimes, except those requiring commission by a natural person[7] such as rape.[8] Establishing that a corporation could be held criminally liable, however, did not end the debate. In fact, the issue may be more contentious today than ever before. The opponents of corporate criminal liability perceive the practice "as the senseless and puerile reaction of an ignorant public, or as an inefficient relic best replaced by a civil scheme."[9] Others think that more corporate prosecutions would be appropriate, as evidenced by the fact that the Department of Justice has increased its focus on corporate crime.[10]

Neither side of the debate claims that there has been no harm, but there is disagreement regarding who is responsible and who should suffer the consequences. What does it even mean to say that a corporation has committed a wrong? One possibility that many have adopted is to ask if someone with a high level of decision-making authority in the corporation has done so.[11] Shareholders have very little say in the management of their corporation while the true decision-making authority rests with the board, and most of the tactical day-to-day management is accomplished by other corporate officials.[12] Therefore, opponents of corporate criminal liability argue that it would be appropriate to hold either the managers or employees liable for any criminal conduct, but not the entire corporation; they argue that it is unfair to punish the shareholders by imposing criminal penalties on the whole entity when only a small part may have engaged in wrongdoing.[13] This point of view leads to the adage that states that "corporations don't commit crimes, people do."[14] Thus, innocent shareholders and employees become "collateral damage" when courts impose criminal liability.[15]

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it Serve?, 109 HARV. L. REV. 1477, 1478 n.2 (1996) [hereinafter "Khanna, *Corporate Criminal Liability*"].

[4] Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *476 ("A corporation cannot commit treason, or felony, or other crime.")).

[5] Kathleen F. Brickey, *Perspectives on Corporate Criminal Liability* 3 (Wash. U. in St. Louis Legal Studies Research Paper Series, Paper No. 12-01-02, 2012), *available at* http://ssrn.com/abstract=1980346.

[6] 212 U.S. 481, 493–95 (1909). For a discussion of the case, see Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 230-32 (2012).

[7] A natural person has been defined as "[a] human being, as distinguished from an artificial person created by law." Utica Mut. Ins. Co. v. Precedent Cos., 782 N.E.2d 470, 476 (Ind. Ct. App. 2003) (citation omitted).

[8] Khanna, *Corporate Criminal Liability*, *supra* note __, at 1488.

[9] Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. (forthcoming 2012) (manuscript at 3), http://ssrn.com/abstract=2046593.

[10] *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1309 (2013).

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

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

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

[14] Brickey, *supra* note __, at 2.

[15] Alschuler, *supra* note __, at 1359.

This was one of the main points raised in *New York Central* when the defendants argued that one punishes innocent shareholders when one punishes the corporation, and that it was impossible for the corporation as an entity to commit a crime because the board (who is ultimately responsible for the decisions of a corporation) could not legally authorize criminal acts.[16] This was not an unusual position because the idea that a corporation was not capable of possessing the moral blameworthiness necessary to perpetrate an intentional crime was a long-held belief.[17] The Supreme Court rejected this position when it held that since a corporation acts through its officers and agents, their purposes, motivations, and intentions are also those of the corporation.[18] The tort law liability framework of respondeat superior was thus established as a viable criminal law theory. Yet, this new criminal application of an established tort principle quickly came under attack. Many people felt that its use was inconsistent with the purpose of criminal law, that is, "punishment of the morally blameworthy—because it relied upon vicarious guilt rather than personal fault."[19] The use of respondeat superior to establish corporate criminal liability was also attacked on the grounds that is was "overly broad."[20] For example, it is possible in both the federal and state systems for a corporation to be held liable for the actions of any employee, even if the employee was specifically instructed not to perform the action or even if the corporation was a victim.[21] In fact, some corporate convictions do seem to have been based on individual actions, which results in disastrous results for the corporation, its employees and shareholders as well as other stakeholders who are also adversely effected; for example, the collapse of Arthur Anderson resulted in the loss of 85,000 jobs and untold difficulties for not only those employees but also for people who relied on those employees or the services the company had provided and whose injuries were not rectified even though the conviction was later reversed.[22]

Multiple scholars have argued that corporate criminal liability is unnecessary and in fact can lead to corporations spending more money avoiding crime than they should, which results in so-called over-deterrence.[23] Nonetheless, while corporations are almost unquestionably an essential part of modern life and in fact bring many advantages, they also definitely have the ability to cause great harm.[24] "Business corporations in particular possess a degree of coercive power equal to, and occasionally greater than, that of the government."[25] Large modern corporations can effectively replicate sovereignty, they have economic resources rivaling some nation states, they have foreign alliances and policies, and they can even exercise security functions.[26] In fact, with the exception of governments, corporations are almost without question the most powerful institutions in the world, and in many instances are in fact even more powerful

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[16] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909).
[17] *See* Pamela H. Bucy, *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 259, 259 (Joshua Dressler ed., 2d ed. 2002).
[18] *New York Central*, 212 U.S. at 492–93.
[19] Khanna, *supra* note __, at 1485.
[20] Sheley, *supra* note __, at 228.
[21] *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985).
[22] Alschuler, *supra* note __, at 1364-66.
[23] Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996).
[24] Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 3-4 (2012).
[25] Darrell A.H. Miller, *Guns, Inc,:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. Rev. 887, 891(2011).
[26] *Id.* at 949-50.

than governments.[27] The actions taken by corporations have contributed to, if not caused, many types of disasters.[28] Due to their size, resources, and complexity, corporations are capable of committing crimes far beyond what individuals can accomplish.[29] Some of this increased harm is due to the "collective qualities" of corporations—that is, their "geographic, structural, and temporal complexities"—that amplify the potential harm caused.[30] Criminalizing corporate behavior may also be appropriate due not only to the large amount of harm that corporations can cause, but also the specific chances for unlawful behavior that arise from corporations' organizational structures.[31] Some scholars also refer to the expressive value of punishing corporations and argue that due to societal perceptions, failing to punish corporations could delegitimize the criminal law.[32] One view of the issue is that only individuals can bear moral responsibility while another is that a corporation can and should be held responsible for employee actions that result from its internal decision-making process, especially if the corporation maintains a culture that encourages wrongdoing.[33]

Some jurists conceive of corporations as mere legal fictions that refer to the people and agreements behind the organizations and, therefore, any liability should attach to these individuals.[34] At the same time, this model of the corporation has received objections on numerous grounds, one of which being that corporations have cultures that are different from those of the individuals in them.[35] Another problem with imposing criminal liability only upon the individuals is that, due to the nature of a large corporation and the possible complexity of its various hierarchies, it can be difficult or even impossible to determine which one individual may have violated the law.[36]

Furthermore, the individuals alone may in fact not be perpetrating or at least orchestrating the criminal behavior, but rather it may be a corporation's standard operating procedure or a part of its business strategy that is creating the criminal behavior.[37] An individual's attitudes and behaviors can be affected by a corporation's culture and customs.[38] If we attribute the criminal behavior of corporations to the individual alone, we may disregard the institutional processes occurring within the organization, which may have at least contributed if not in fact caused the criminal behavior.[39] There are many relevant ways that corporate culture and organizational structure can influence individual decision making.[40] It has been known for many years that the

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[27] Goforth, *supra* note __, at 618 (2010) (citation omitted).
[28] Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 119 (2009).
[29] Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009).
[30] *Id.* at 4.
[31] Bucy, *supra* note __, at 1437.
[32] Sheley, *supra* note __, at 227.
[33] John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 LOY. U. CHI. L.J. 507, 508 (2008).
[34] Gilchrist, *supra* note __, at 15.
[35] *See id.* at 16.
[36] Brickey, *supra* note __, at 22.
[37] *See* Beale, *supra* note __, at 1484 (citing the engineering giant Siemens's systemic use of bribes as one example).
[38] Ripken, *supra* note __, at 103.
[39] Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It's All About Power*, 41 STETSON L. REV. 97, 110 (2011).
[40] *See* Goforth, *supra* note __, at 634 (identifying increased risk taking, the desire to engage in team playing at the

policies of corporations can encourage criminal behavior.[41] A notorious example of corporate misconduct inextricably tied to the character and culture of the corporation was the tobacco companies' longstanding pattern of fraudulently misleading regulators and the public about the obvious and known health risks involved in smoking.[42] In these types of situations, the proper question to ask is: "What was going on in that organization that made people act that way?".[43]

Another argument that has been used to justify corporate criminal liability is that it allows the community to express its moral judgment.[44] It is possible that the criminal justice system itself would be weakened due to appearances of favoritism and unequal application of the law if we did not hold corporations criminally liable when people think we should.[45] This effect could be exacerbated by the fact that people reportedly experience "*greater* moral indignation toward corporations than toward natural persons for the same crimes."[46] Hence, we would have a situation in which people feel that the criminal justice system is functioning below the norm when it should actually function at a higher level than the norm. A final argument in favor of corporate criminal liability is seemingly counter-intuitively for the protection of corporations, or at least for the protection of law-abiding corporations. Corporations that follow the law may be at a competitive disadvantage compared to corporations that disregard the law.[47] These law-abiding corporations would be placed at an even greater disadvantage if we did not have criminal sanctions.

The appropriateness of criminal sanctions is even further complicated by the availability of civil corrective measures. It is possible that corporate misconduct could be controlled through civil enforcement, but it is also possible that this would be ineffective because civil fines cannot replicate the reputational harm of criminal sanctions.[48] At the same time, this reputational damage stemming from criminal convictions is also problematic. The unpredictability associated with reputational damage may be advantageous,[49] and yet this advantage could be lessened by "imprecision and lack of uniformity."[50] While there remain many objections and detractors, the supporters of corporate criminal sanctions currently outnumber its opponents. The jurists who favor corporate criminal liability do also argue, however, that the prosecution of corporations should be simplified.[51] To understand this part of the debate, it is helpful to examine the nature of the corporation in the eyes of the law.

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expense of good judgment, and the decision to cut corners).

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

[42] *See generally* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999).

[43] Goforth, *supra* note __, at 648 (citation omitted).

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

[45] Gilchrist, *supra* note __, at 51.

[46] *Id.*; *see also* Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 792 (2000) ("People often search for group rather than individual-level causes for extremely negative events.").

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

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

[49] *See id.* at 514.

[50] Gilchrist, *supra* note __, at 38.

[51] *See, e.g.*, Beale, *supra* note __, at 1482.

B. Corporations and Personhood

It is generally acknowledged that "[c]orporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great companies."[52] Given this fact, it is important to understand how corporations are viewed generally in society. Scholars and commentators realized almost a hundred years ago that juries are more likely to find corporations guilty than they are to find individuals guilty.[53] This willingness to attribute guilt to a corporation is unlikely to arise from corporations' all being malevolent. As it happens, many early corporations were explicitly benevolent institutions, including several new church congregations.[54] Indeed, many different types of organizations, are formed as corporations, ranging from churches to the Guardian Angels (self-appointed public protectors) and even to the Ku Klux Klan.[55] Furthermore, one must remember that most corporations are small: of the three million businesses that belong to the U.S. Chamber of Commerce, more than 95% have fewer than 100 employees and more than 75% of federally taxed corporations have less than one million dollars in receipts reported per year.[56] Regardless of the variability of types of corporations, the fact remains that a lot of individuals view them with skepticism or downright hostility. Many people have been concerned with protecting democracy from "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with help of the corporate form."[57] This fear of corporations has led to a number of people referring to them as "soulless" and some like Thomas Jefferson fearing that they "would subvert the Republic".[58] This fear is based at least partly on the claim that "equality of constitutional rights plus an inequality of legislated and de facto powers leads inexorably to the supremacy of artificial over real persons."[59] Nevertheless, this fear or dislike of corporations is far from universal, and many scholars have maintained that corporations are not "bad" while simultaneously arguing that they have been given to much power.[60]

Whether corporations have been given too much power is easier to answer if we look at how we do and should think of corporations generally, both from a theoretical perspective and from a historical one. Historically, at different points both England's corporations and ours have been subject to broad visitorial powers and have had limited constitutional protections compared with individuals.[61] In American history, corporations did not have a significant role in the Constitution. Justice Stevens pointed out that the Framers "had little trouble distinguishing corporations from human beings."[62] The Constitution does not name corporations.[63] In fact, only four states (Connecticut, Pennsylvania, Massachusetts and Vermont) mention corporations in

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[52] Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 578 (1990) (citing Hale v. Henkel, 201 U.S. 43, 76 (1906)).
[53] *See* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 834-35 (1927).
[54] *See* Goforth, *supra* note __, at 625.
[55] Miller, *supra* note __, at 906.
[56] Citizens United v. Fed. Election Comm'n, 550 U.S. 310, 379-80 (2010).
[57] Miller, *supra* note __, at 896 (citation omitted).
[58] *Citizens United*, 550 U.S. at 427.
[59] Mayer, *supra* note __, at 658.
[60] Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 734(2013).
[61] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 206 (1946).
[62] Citizens United v. Fed. Election Comm'n, 550 U.S. 310, 428 (2010) (Stevens, J., concurring in part and dissenting in part).
[63] Mayer, *supra* note __, at 579.

their original constitutions,[64] and in situations in which state constitutions did award specific rights to corporations, these were different than those given to individuals.[65]

It has been disputed whether the corporation is an entity beyond the people involved and its legal status.[66] Chief Justice Mashall gave an early description of corporations in which he said that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of the law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[67] For example, a corporation is not allowed to conduct business beyond the scope of its charter.[68] In the most recent description of the corporate entity the Court stated:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[69]

In line with this theory, "[w]hile they may and should have protection from unlawful demands made in the name of public investigation . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy."[70] Justice Stevens has pointed out that despite their large contributions to society, corporations are not members of it.[71]

At various times, the Court has specifically expressed the belief that there are clear distinctions between individuals and corporations.[72] In part because of the idea that corporations derive their existence and hence all privileges from the state, their rights have been limited. For example, at one point a Supreme Court Justice pointed out that if a law enforcement agency was simply "curious" about a corporation, it would have the legitimate right to satisfy that curiosity by conducting investigations.[73] The only significant limitations were that the curiosity had to deal with subject matter in the domain of particular agencies, the information requested was not too indefinite, and the information was reasonably relevant.[74]

The decision in *Santa Clara County v. Southern Pacific Railroad Co.*[75] showed another view, supported by an early Supreme Court, in which a corporation has rights and duties conferred upon it due to the rights and duties of its human members.[76] Today, it is established

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[64] Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 239-40 (2011) (citations omitted).
[65] *Id.* at 241.
[66] Ripken, *supra* note __, at 100.
[67] Trustees of Dartmouth College v. Woodward, 4 L.Ed. 629, 636 (1819).
[68] *See* Hale v. Henkel, 201 U.S. 43, 74-75 (1906).
[69] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).
[70] United States v. Morton Salt, 338 U.S. 632, 651 (1950).
[71] Citizens United v. Fed. Election Comm'n, 550 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part).
[72] Braswell v. United States 487 U.S. 99, 105 (1988) (citing *Hale*, 201 U.S. at 74 (1906)).
[73] United States v. Morton Salt, 338 U.S. 632, 652 (1950).
[74] *Id.*
[75] 118 U.S. 394 (1886).
[76] *Id.* at 396 (citing oral arguments).

that corporations are treated in many ways as though they are natural people. For example, they can own property, enter legally binding contracts, be sued in court (and in turn sue others), and be prosecuted and held responsible for criminal actions.[77] This does not mean, however, that they should always be treated the same as natural persons. Furthermore, most would agree that in the law, a paramount goal is that like actors should be treated alike and different actors should be treated differently.[78] "[T]reating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same."[79] At their root, corporations exist because some endeavors require joint efforts and can only be achieved with many individuals participating. If the activities of large numbers of people are properly coordinated, the result can be far superior to the sum of what the individuals contributed.[80] One of the challenges that has arisen as a result, however, has been to define this new collective entity and answer whether or not it is a "person." The Supreme Court declared in 1886 that a corporation is a person for at least some constitutional purposes.[81] Yet, there are some basic differences between a "natural" person and a corporation, as Justice Stevens pointed out: "corporations have 'limited liability' for their owners and managers, 'perpetual life', separation of ownership and control, and favorable treatment of the accumulation and distribution of assets that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments."[82] Recently, Justice Ginsburg agreed with Justice Stevens when he pointed out that "corporations have no conscience, no beliefs, no feelings, no thoughts, no desires." [83] There are at least three different ways that a corporation can be viewed as a person: a moral person, a natural person, and a legal person.[84] A corporation clearly is not a natural person, clearly is a legal person, and arguably is a moral person that should be held morally accountable.[85]

Scholars have claimed that corporations "are neither humans nor citizens. They are not values in themselves, but tools to human ends. . . . [T]here is no reason that we should respect their claims to autonomy unless we also conclude that corporate autonomy is useful to real human beings."[86] Further evidence against a corporation's personhood claim is that corporations cannot decide, act, or intend on their own, and that these functions are simply accomplished through their human members, without whom it would have no identity or any ability to function.[87] Nevertheless, this view of the corporation as an extension of the humans involved is belied by the fact that even if every human involved has died, the same corporation can live for

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[77] Brickey, *supra* note __, at 2.
[78] Bucy, *supra* note __, at 1100 (citing H.L.A. HART, THE CONCEPT OF LAWS 155 (1961)).
[79] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 33 (1986).
[80] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 264 (1999).
[81] Mayer, *supra* note __, at 581 (citation omitted).
[82] Citizens United v. Fed. Election Comm'n, 550 U.S. 310, 465 (2010) (Stevens, J., concurring in part and dissenting in part).
[83] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (citing *Citizens United*, 550 U.S. at 466 (Stevens, J., concurring in part and dissenting in part)).
[84] Kim, *supra* note __, at 784.
[85] *Id.*
[86] Kent Greenfield & Daniel J.H. Greenwood, *Should Corporations Have First Amendment Rights?"*, 30 SEATTLE U.L. REV. 875, 878 (2007).
[87] *See, e.g.*, Ripken, *supra* note __, at 100.

several generations without changing.[88] Another view of corporations, which contains a stronger link to personhood, is that each of them is unique and has its own personality, character, and mens rea that are social realities understood by the American people.[89] When such corporations behave in a manner inconsistent with valuing human worth, they send a message that can only be corrected by the condemnation and power inherent in criminal prosecutions.[90] After *Citizens United*, some commentators have gone so far as to say that, at least for First Amendment purposes, "corporations are now people".[91] And as soon as corporations are people for purposes of one right, the question will arise as to why they are not people when it comes to other rights.[92] Hence, some Supreme Court Justices have questioned whether there was a mistake when the corporation, a creature of state law, was imbued with human characteristics at all.[93] Justice Stevens explained that people with differing understandings of the nature of corporations can all see that corporations are distinguishable from human beings and the government must therefore regulate them differently.[94] It is possible that eventually the corporation's status may need to be determined by a constitutional amendment.[95] For example, more than one scholar has argued that we may need a constitutional amendment that states that corporations only have the rights specifically granted to them.[96]

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

C. The Purpose of Corporate Criminal Liability

By the beginning of the last century, prosecutions of large-scale companies had become much more common, and now they can even result in the death of the company.[97] Organizations are uniquely limited to fines and other non-incarcerating criminal penalties,[98] but they are obviously still subject to significant repercussions. Some have argued, however, that punishing corporations in reality means punishing the innocent stockholders and effectively depriving them of property without an opportunity to be heard.[99] Other scholars have argued that vicarious attribution is necessary for corporations because it may be difficult to prosecute or even identify

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[88] PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 1 (1962).
[89] Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 486-87 (2006).
[90] *Id.* at 487.
[91] Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127, 127 (2011).
[92] Miller, *supra* note __, at 915.
[93] *Id.* at 897 (citing Transcript of Oral Argument at 7, *Citizens United*, 130 S. Ct. 876 (No. 08-205) at 33).
[94] *Citizens United*, 550 U.S. at 465 n. 72 (Stevens, J., concurring in part and dissenting in part).
[95] Mayer, *supra* note __, at 651.
[96] Dibadj, *supra* note __, at 782.
[97] Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liabilty Entities—Should Business Entities Have a Fifth Amendment Privilege*, 2005 COLUM. BUS. L. REV. 1, 72 (2005).
[98] Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 410 (1994).
[99] V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion? The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 363 (1999) (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909)) [hereinafter "Khanna, *Notion of Corporate Fault*].

a natural individual for criminal actions that occurred due to a corporation's activities.[100] However, still other scholars have pointed out that this has led to criminal prosecutions even when the management apparently took significant steps to avoid the commission of criminal activities.[101] Prosecutors reportedly "want businesses to cooperate with them and aid them in their efforts to prosecute corporate employees who violate federal law. Prosecutors themselves will frankly admit that the purpose of corporate criminal liability is not to punish corporations, but to force them to help in the prosecution of their employees."[102] After the scandals surrounding companies like Enron, WorldCom, and Tyco, Congress passed legislation (primarily the Sarbanes-Oxley Act) that criminalized new behaviors and enhanced the penalties for previously existing crimes.[103]

Deterrence, retribution, rehabilitation, and incapacitation are generally the quintessential purposes of criminal prosecutions.[104] The United States Supreme Court has held that deterrence is an appropriate purpose of criminal liability, and retribution is another legitimate basis for criminal corporate prosecutions because corporations can appropriately be considered blameworthy.[105] Another legitimate purpose of the criminal law is the expression of condemnation. There are a wide variety of types and degrees of condemnation for the different kinds of criminal acts. That being said, there is almost always some level of condemnation present, and some have argued that this expression serves purposes beyond deterrence.[106] Helping to shape and convey society's feelings of condemnation is one of the possible goals of criminal law.[107] On the other hand, some will argue that neither expression nor retribution are proper goals. Many commentators believe that deterrence is the main object of corporate criminal liability[108] and is in fact often treated by many scholars and judges as the primary if not sole goal for such liability.[109]

Deterrence can be both general and specific in this context. General deterrence refers to the idea that even those who are not themselves punished can be deterred from committing a crime by observing or at least being aware of the punishment that others have received for the same crime.[110] Specific deterrence on the other hand is directed at the actual (or specific) person or institution that committed the offense and tries to prevent that entity from committing the same or similar acts in the future.[111] To successfully use the deterrence rationale, and hence to

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[100] Adlestein, *supra* note __, at 385.
[101] *Id.* at 386.
[102] Hasnas, *supra* note __, at 512.
[103] Nancy R. Mansfield et al. *The Shocking Impact of Corporate Scandal on Directors' and Officers' Liability*, 20 U. MIAMI BUS. L. REV. 211, 231 (2012).
[104] Brickey, *supra* note __, at 14; Sheley, *supra* note __, at 230.
[105] United States v. Park, 421 U.S. 658, 673 (1975).
[106] Gilchrist, *supra* note __, at 6; *see also* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998) (arguing that the public wants to see condemnation of both individuals and corporations through the criminal law and that imposing criminal sanctions therefore increases public welfare). For a discussion of the expressive function of criminal liability in the intellectual property context, see Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 494 (2011).
[107] *See generally* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990).
[108] Khanna, *Notion of Corporate Fault*, *supra* note __, at 363 (citations omitted).
[109] Khanna, *Corporate Criminal Liability*, *supra* note __, at 1494 & nn.91-93 (1996).
[110] Brickey, *supra* note __, at 14.
[111] *Id.* at 16.

justify corporate criminal liability as opposed to just individual liability, one must show that corporate criminal liability provides a marginal increase in deterrence in addition to the level that individual liability alone accomplishes.[112] To demonstrate this more effectively, it is useful to understand some of the specific factors that affect decision-making behavior. In at least one survey of corporate ethics, "superiors" were classified as the most important contributing factor to criminal or unethical decision making.[113] In view of this, criminal liability should encourage the optimal level of effort on the parts of owners and managers when they guide their various agents to comply with the law.[114] As this Article will discuss later, it is entirely possible that removing the reassurance of the exclusionary rule and therefore making prosecution and conviction more likely will increase the amount of deterrence that corporations experience.

In line with maximizing utility, "[a] judge's goal in punishing a corporation should be to induce a level of monitoring that will prevent more criminal harm than the monitoring will cost."[115] Corporate liability may not only serve as an external constraint, but should also be considered a way to induce internal monitoring.[116] In addition, the problem of corporate crime seems to be a contagious problem. For example, in the last ten years virtually every major pharmaceutical company has pleaded guilty or agreed to a settlement based upon serious misconduct.[117] In acknowledging the problem and referring to possible solutions, the U.S. Supreme Court made a significant point when it said that "to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at."[118] Today, this statement is almost certainly overstated due to the many administrative agencies and extended civil liability that could work to curtail corporate misconduct. Notwithstanding this fact, laws dealing with corporate criminal liability have not only survived but their number has actually increased dramatically.[119] The survival and proliferation of these laws is caused in part by the law's capability to simultaneously achieve "consequential, retributive and expressive benefits."[120] Whichever goals we choose to pursue, we still need to address how to successfully accomplish them within the framework of corporate criminal liability.

D. Achieving the Goals of Corporate Criminal Liability

After the decision in *New York Central*,[121] courts used the principle of respondeat superior to establish liability without any significant additional analysis.[122] The statute under analysis in the case explicitly stated that a corporation could be held liable.[123] Shortly after the

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[112] Khanna, *Corporate Criminal Liability*, *supra* note __, at 1494-95.
[113] CLINARD & YEAGER, *supra* note __, at 59.
[114] United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972).
[115] Alschuler, *supra* note __, at 1360.
[116] *Id.*
[117] Beale, *supra* note __, at 1484 (citation omitted).
[118] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909).
[119] Baer, *supra* note __, at 4.
[120] *Id.* at 2.
[121] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).
[122] Alschuler, *supra* note __, at 1364.
[123] *New York Central*, 212 U.S. at 491.

case was resolved, many courts started reading other criminal statutes as though they too were meant to be applied to corporations even when there was little to no indication that the legislature had intended to have that happen.[124] Under the newly established (at least in the criminal context) respondeat superior standard, there are three necessary conditions for a corporation to be held criminally liable: (1) an agent of the corporation acted with the requisite mental state, (2) the agent acted within the scope of his employment, and (3) the agent intended to benefit the corporation.[125]

In addition to using respondeat superior in ways it could be argued were not intended, some federal courts have also imposed liability upon corporations based on a theory of collective mens rea. Under this theory, no specific individual ever had the required mens rea, but the corporation could be deemed to have had it, which results in company liability even though no culpable individual could be identified.[126] An example of collective mens rea would be that "if agent Y dumps material into a river without knowledge of its hazardousness, but agent X knows of its hazardousness, yet does not engage in dumping, then the corporation is liable under [collective mens rea] for knowingly dumping hazardous material into a river."[127]

In fact, not only is mens rea arguably simpler to prove in a corporate setting, but all of the elements of criminal corporate liability are fairly easily met for a number of reasons. For example, the requirement that an agent act within the scope of his employment can be satisfied even though the corporation had explicitly forbidden the wrongful conduct. Another example of the ease of fulfilling the requirements can be seen in connection with the requirement that the agent "benefit the corporation". This element can be satisfied even if that was not his only motivation and/or he had ultimately not benefitted the corporation at all.[128] Some have argued that even potentially excessive prosecutions of corporations, which result in punishment for employees' actions that are clearly against publicized corporate policies, can help to deter wrongdoing and serve to encourage corporations to implement effective measures as opposed to empty policy declarations.[129] The idea is that this way, it is less likely that a corporation could impose a facially solid compliance program and never actually affect the culture or desire to comply with the law.[130] Due to this possibility, courts usually do not acknowledge even extensive compliance programs as a defense to the illegal conduct, including if only one employee committed the crime.[131] Avoiding criminal behavior is obviously very desirable, but extreme penalties can cause over-deterrence and lead to an inappropriate increase in corporate resources devoted to enforcement.[132]

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[124] *See, e.g.*, United States v. Union Supply Co., 215 U.S. 50, 54–55 (1909); London v. Everett H. Dunbar Corp., 179 F. 506, 510 (1st Cir. 1910); People v. Star Co., 120 N.Y.S. 498, 500 (N.Y. App. Div. 1909); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914).

[125] Khanna, *Corporate Criminal Liability*, *supra* note __, at 1489-90.

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

[127] Khanna, *Notion of Corporate Fault*, *supra* note __, at 408.

[128] Khanna, *Corporate Criminal Liability*, *supra* note __, at 1490. Practically speaking, prosecutors do consider whether or not it was a "rogue" employee who committed the crime or if the culture of the corporation contributed to the offense. Baer, *supra* note __, at 7 (internal quotation marks omitted).

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

[130] Ramirez, *supra* note __, at 965.

[131] Brickey, *supra* note __, at 9.

[132] Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 325-26 (1996).

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

III. The Exclusionary Rule

The two fundamental tenets of evidence law are that we should exclude irrelevant evidence but admit relevant evidence unless there is a good reason to exclude it.[133] Arguably, the exclusionary rule violates this tenet. The rule prevents courts from admitting evidence that has been obtained in violation of the Constitution. Specifically, as most relevant for this Article, evidence obtained in violation of the Fourth Amendment cannot be introduced at trial to prove the defendant's guilt.[134] It is worth examining why the rule exists, where it originated, and what role it should play for corporate criminal prosecutions.

A. The History of the Exclusionary Rule

While the exclusionary rule applies almost exclusively to criminal law, the Fourth Amendment deals with all searches and seizures and does not distinguish between criminal and civil matters.[135] The Amendment also does not discuss suppression of evidence gathered in violation of its commands.[136] The exclusionary rule first appeared in fairly cryptic form in the 1886 case of *Boyd v. United States*[137] and made its first significant appearance in the 1914 case of *Weeks v. United States*.[138] In fact, until well into the nineteenth century, courts did not consider the source of the evidence, but rather only its probative value. If evidence was probative, it was admitted.[139] Courts have acknowledged that the suppressed evidence can at times be "the most probative information bearing on the guilt or innocence of the defendant".[140] In England, if a coerced confession leads to physical evidence, the confession may be suppressed, but the physical evidence will be admitted.[141] All evidentiary practices that prevent information from being viewed by the judge or jury can be characterized as "truth-suppressing devices".[142] Early violators of search and seizure law were held civilly liable for offenses

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

[134] Weeks v. United States, 232 U.S. 383 (1914), *overruled on other grounds* (applying the exclusionary rule in federal court); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the rule in state court).

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

[136] Davis v. United States 131 S.Ct. 2419, 2426 (2011).

[137] 116 U.S. 616 (1886). For an analysis of this issue, see Thomas Y. Davies, *An Account of* Mapp v. Ohio *That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622-623 (2007) (citation omitted).

[138] 232 U.S. 390 (1914). *See also Davies*, *supra* note __, at 623 (citation omitted) (discussing the case).

[139] Charles D. Levine *The Second Circuit Constricts the Applicability of the Exclusionary Rule*, 50 BROOK. L. REV. 601, 604 (1984).

[140] *See* Stone v. Powell, 428 U.S. 465, 490 (1976).

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

[142] Roger Roots *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 47 (2010) (citations omitted).

including trespass, assault and battery, false imprisonment, or malicious prosecution.[143] The Supreme Court has pointed out that most of the English-speaking world does not find exclusion vital to the protection of constitutionally guaranteed rights.[144]

There is in fact nothing in the Fourth Amendment that expressly precludes the use of evidence obtained in violation of that Amendment.[145] Some commentators have claimed that the Framers thought that other remedies like actions for damages were sufficient to protect the rights that they had established.[146] The birth of the exclusionary rule was at least partly necessitated by the birth of the modern police force and diminution of tort remedies for trespass and false arrest.[147]

Over a hundred years ago the Supreme Court stated that "the maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizens".[148] The Supreme Court at one point went so far as to say that if letters and other private documents can be confiscated and used against a defendant, the protections of the Fourth Amendment against searches and seizures would be rendered meaningless.[149] Fourth Amendment breaches reflect "a failure to foster a constitutional culture in which rights are fully respected, and the denial of a remedy for breach by society's representatives is a de facto endorsement of the wrong."[150] At the same time, the Fourth Amendment is silent about how the right to be free from unreasonable searches and seizures should be enforced.[151] The only thing required by the Constitution is that there be some *effective* remedy to ensure the protections of the Fourth Amendment.[152] On the other hand, the exclusionary doctrine has been described as an essential component of the right to privacy.[153] Even before the Supreme Court applied the exclusionary rule to the states, some states independently decided that exclusion was an appropriate remedy; for example, California believed that other remedies were not sufficient and therefore it had to impose the exclusionary rule upon itself.[154] Eventually, the Supreme Court agreed and stated that other remedies had failed to uphold the guarantees of the Fourth Amendment and therefore the Court had to apply the exclusionary rule to the states.[155]

Initially, the Court examined multiple rationales for doing so, including the need to protect judicial integrity and the personal constitutional rights of defendants, but ultimately deterrence against law enforcement misbehavior emerged as the dominant reason.[156] The Court

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[143] *Id.* at 8-9.
[144] Linkletter v. Walker, 381 U.S. 618, 630 (1965).
[145] United States v. Leon, 468 U.S. 897, 906 (1984).
[146] Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 758 (1993).
[147] Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N. C. L. REV. 1559, 1595 (1996) [hereinafter "Dripps, *Akhil Amar*"].
[148] Weeks v. United States 232 U.S. 383, 390 (1914).
[149] *Id.* at 393.
[150] Taslitz, *supra* note __, at 575.
[151] Davis v. United States 131 S.Ct. 2419, 2423 (2011).
[152] Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-And-Seizure Cases*, 83 COLUM. L. REV. 1365, 1385 (1983).
[153] Mapp v. Ohio 367 U.S. 643, 656 (1961).
[154] People v. Cahan 282 P.2d 905, 911 (1955).
[155] Mapp, 367 U.S. at 652.
[156] Levine, *supra* note __, at 606.

held in 1960 that the "purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it,"[157] and, by the mid-1970s, deterrence had become the primary if not the only relevant purpose discussed.[158] In one of the earliest modern-day exclusion cases, the Court pointed out that the rule was not a "command" of the Fourth Amendment, but rather a judicially fashioned rule of evidence.[159] Further, since the purpose of most rules of evidence is to "facilitate the ascertainment of the facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead"[160] and the exclusionary rule blatantly contradicts that principle, the Court was very conscious of the costs it was imposing by mandating its use. Indeed, suppression motions are filed in approximately 7% of criminal cases and are successful approximately 12% of the time.[161] While these figures may not sound high at first blush, some scholars have claimed that as many as 55,000 accused criminals or more may be released per year through the use of the exclusionary rule.[162] The Court has acknowledged that even illegally seized evidence could be very probative and reliable. Before the illegally obtained evidence is excluded, "the deterrent effect of the exclusion must be balanced against the social value of basing adjudications upon all the facts."[163]

In the past, courts applied the exclusionary rule much more liberally and in fact almost automatically once a Fourth Amendment violation was found.[164] Today, courts refuse to apply the exclusionary rule in many situations.[165] Some scholars have argued that the exceptions now found in the application of the exclusionary rule are arbitrary.[166] Whether arbitrary or not, there are certainly a significant number of them. Evidence has been ruled admissible for particular purposes like impeachment,[167] civil tax cases,[168] and grand jury proceedings.[169] In many settings, lower courts have reached conflicting decisions on whether the exclusionary rule should be applied.[170] In other situations, courts have established that exclusion is inappropriate. Evidence that may be excluded from the case in chief may still be used to impeach a defendant.[171] When police officers make a "good-faith" error, the evidence recovered is not excluded, pursuant to the so-called *Leon* exception.[172] The *Leon* exception was extended to clerical errors in *Arizona v.*

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[157] Elkins v. United States 364 U.S. 206, (1960).
[158] Levine, *supra* note __, at 602.
[159] Mapp, 367 U.S. at 661.
[160] Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 941 (1983) (citation omitted).
[161] Davis v. United States 131 S.Ct. 2419, 2439 (2011) (citation omitted).
[162] Patrick Tinsely, N. Stephan Kinsella & Walter Black, *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 68 (2004).
[163] Levine, *supra* note __, at 608 (citation omitted).
[164] Davis v. United States 131 S.Ct. 2419, 2427 (2011).
[165] For some examples, see Michigan v. DeFillippino, 443 U.S. 31 (1979), United States v. Caceres, 440 U.S. 741 (1979), and United States v. Janis, 428 U.S. 433 (1979).
[166] Dripps, *Akhil Amar*, supra note __, at 1608.
[167] United States v. Havens, 446 U.S. 620 628 (1980).
[168] United States v. Janis, 428 U.S. 433, 454 (1976).
[169] United States v. Calandra, U.S. 338, 354 (1974).
[170] Robert H. Solmon *The Seventh Circuit Adopts a Good Faith, Reasonable Belief Exception to the Exclusionary Rule in OSHA Proceedings*, 62 WASH. U. L.Q. 189, 192 (1984) (citation omitted).
[171] Walder v. United States, 347 U.S. 62 (1954); Oregon v. Hass, 420 U.S. 714 (1975).
[172] See United States v. Leon, 468 U.S. 897 (1984).

Evans,[173] and under some circumstances to legislative mistakes in *Illinois v. Krull*.[174] The exclusionary rule was held not to apply to violations of the "knock and announce rule"[175] or to civil deportation proceedings.[176]

Today's courts apply a balancing test to the exclusionary rule and only use it when the advantages of deterring police misconduct outweigh the societal costs of excluding valuable information.[177] Multiple scholars have claimed that it may be one thing to allow in evidence when a single official acted inappropriately, but it is something totally different when police procedures deliberately and flagrantly violate the Constitution.[178]As the Supreme Court pointed out, to answer the question of whether evidence should be excluded, one must mediate "between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are 'acquitted' or convicted on the basis of all the evidence which exposes the truth".[179] Police conduct leads to exclusion only when it is deliberate enough to produce meaningful deterrence and culpable enough to merit the loss to the justice system.[180] At least since *Leon*, courts have refocused the cost-benefit analysis on increased attention paid to the flagrancy of the police's behavior.[181] "In order to exclude unlawfully obtained evidence, the benefit of "some incremental deterrent" to police misconduct must outweigh the "substantial social cost" of setting a criminal free.[182] In *Leon*, the Court explicitly stated that "the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom".[183] Furthermore, the Supreme Court explained in a different case that in the context of the Fourth Amendment, there are ways to modify the exclusionary rule without inhibiting it from exercising its original function.[184] The Court has stated that society must take the "bitter pill" of exclusion only as a last resort.[185]

B. Arguments Supporting the Exclusion of Evidence

Over the decades since the exclusionary rule has been in effect, there have been many arguments both defending it and attacking it. This Section will address in more detail some of the primary arguments supporting the proposition that evidence that is illegally obtained should be excluded. As discussed in the previous Section, by far the primary justification for the exclusionary rule is that it is the only effective way to deter police misconduct. The Supreme

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[173] 514 U.S. 1 (1995).
[174] 480 U.S. 340 (1987). *See* Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 37 (1996) (discussing related cases).
[175] Michigan v. Hudson, 547 U.S. 586 (2006).
[176] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)
[177] *See e.g.*, United States v. Caceres, 440 U.S. 741, 754-55 (1979); United States v. Calandra U.S. 338, 348 (1974).
[178] Dripps, *Akhil Amar*, *supra* note __, at 1613-14.
[179] *Leon*, 468 U.S. at 900-01 (citation omitted).
[180] Davis v. United States 131 S.Ct. 2419, 2428 (2011) (citation omitted).
[181] *Id.* at 2427 (citation omitted).
[182] Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 48 (2010) (citation omitted).
[183] *Leon*, 468 U.S. at 928.
[184] *Id.* at 905.
[185] Hudson v. Michigan, 547 U.S. 586, 591 (2006).

Court has also, however, offered judicial integrity as another ground for the exclusionary rule.[186] By doing so, it was following Justice Brandeis's earlier dissent in which he wrote: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[187] The rationale of judicial integrity contains two ideas, which are that 1) preventing the introduction of illegally seized evidence stops the wrongdoer from profiting from his wrong, and 2) protecting the trust in governmental institutions is paramount.[188] This argument boils down to the idea that we need to uphold the stature of the courts and that this would become difficult if they allowed lawless behavior.

Another argument in favor of exclusion is actually a response to the claim that alternative responses could achieve the deterrent effect we desire. One often suggested alternative is the possibility of damages, meaning that the police officer could be sued and forced to make payments to those whose rights he violated. Some are concerned, however, that restitution to victims will not appropriately deter police officers from violating the law.[189] There is somewhat conflicting evidence on the successfulness or realism of suing police departments.[190] Most winning damages cases involve some type of police brutality or illegal detention.[191]

Obtaining reparations in this form is difficult for multiple reasons. For one, it is hard to get damages in civil cases even if a violation is shown because the specific harm caused by the violation is difficult to prove.[192] Attorneys' fees may only be available in some cases.[193] Additionally, jurors are reluctant to find in favor of plaintiffs who have been convicted of a related offense.[194] It is well documented that jurors are typically hesitant to give convicted felons damages.[195] Another difficulty with the damages remedy is that the largest harm is possibly the jail time associated with conviction, and it is unlikely that anybody would agree to pay a guilty defendant based upon the length of her sentence.[196] Another hurdle for a plaintiff—who is a civil plaintiff that is most likely also a criminal defendant—to overcome is that for him to prevail, he would need to show both that a Fourth Amendment right has been violated and that the officer is not entitled to qualified immunity.[197] "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,"[198] although under some

[186] Mapp v. Ohio 367 U.S. 643, 659 (1961) (citation omitted).
[187] Olmstead v. United States, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting).
[188] Charles E. Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667, 680 (1981).
[189] Barnett, *supra* note __, at 943-44.
[190] Donald A. Dripps, *The "New" Exclusionary Rule Debate: from "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 FORDHAM URB. L.J. 743, 754 (2010) (citations omitted) [hereinafter "Dripps, *Exclusionary Rule Debate*"].
[191] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 919 (1991).
[192] Cassell, *supra* note __, at 859.
[193] *Id*.
[194] Barnett, *supra* note __, at 943.
[195] Bloom & Fentin, *supra* note __, at 77 (2010) (citation omitted).
[196] Stuntz, *supra* note __, at 900-901.
[197] Bloom & Fentin, *supra* note __, 76.
[198] Messerschmidt v. Millender 132 S.Ct. 1235, 1239 (2012) (citing Pearson v. Callahan 555 U.S. 223, 231).

circumstances officials can lose that immunity.[199] Qualified immunity may not apply if the violation is egregious, such as if the search warrant did not describe any of the items to be seized,[200] but this is not an easy hurdle to overcome. Another potential problem for alternative remedies is the fact that the courts have upheld agreements in which search victims waive civil remedies in return for a favorable plea bargain.[201] So, if a police officer violates someone's rights, the defendant could be persuaded away from enforcing his rights as part of a plea negotiation.

On the other hand, we may not reach the desired goal even if we do have successful lawsuits against the police. A possible problem with direct remedies against police officers may be over-deterrence. The concern is basically that we do not want police officers to avoid searches of criminal suspects all the time out of fear for the officers' own homes or personal property if they are mistaken about the constitutionality of a search. If damages are too high they will result in over-deterrence, but if they are too low they will not deter enough.[202] This problem could potentially be avoided if courts imposed liability on the state rather than officer and had the state encourage individuals to act lawfully.[203] Other possible approaches could include the use of police department administrative procedures or even possibly criminal prosecutions for violating a suspect's constitutional rights, although these measures all contain their own difficulties. One issue with any of these alternative forms of enforcing the constitutional protections occurs if the agents of the state are unknown, as in the *Weeks v. United States* case.[204] If the individuals' identities are unknown, they cannot be personally sued and neither can administrative action be taken against them. Additionally, the Supreme Court has pointed out the past ineffectiveness of prosecutions against police officers, of administrative disciplinary actions, and of trespass tort suits.[205] Various scholars have claimed that remedies other than exclusion are "worthless and futile".[206] Some Justices have even said that "there is but one alternative to the rule of exclusion. That is no sanction at all.[207] The modern courts' approach to Fourth Amendment violations reflects the idea that once someone suffers a harm stemming from the violation, it cannot be repaired, and that privacy harms are irreversible.[208] Therefore, damages would not suffice to correct the problem.

C. Arguments Against the Exclusion of Evidence

One of the most famous quotations dealing with the exclusionary rule comes from Justice (then Judge) Cardozo, who said that "[t]he criminal is to go free because the constable has blundered".[209] While this quotation encompasses much of what many people find objectionable

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[199] Taslitz, *supra* note __, at 519.
[200] Groh v. Ramirez, 540 U.S. 551, 557 (2004).
[201] Dripps, *supra* note __, at 758 (citation omitted) [hereinafter "Dripps, *Exclusionary Rule Debate*].
[202] *Id*. at 746.
[203] United States v. Leon, 468 U.S. 897, 974 n.28 (1984).
[204] Weeks v. United States, 232 U.S. 383, 387 (1914).
[205] Mapp v. Ohio, 367 U.S. 643, 670 (1961).
[206] William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 818 (2000) (citation omitted).
[207] Wolf v. Colorado, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting).
[208] Heffernan, *supra* note __, at 800.
[209] People v. Defore 150 N.E. 585, 587 (N.Y. 1926).

about the exclusionary rule (i.e., that a criminal goes free due to a mistake), it is far from the sole objection to the rule. This Section will examine several of the criticisms to the rule in preparation for applying its rationales to corporations in the next Part.

As Justice Stewart pointed out, there are at least four legitimate objections to the exclusionary rule: 1) It works only by imposing a very high cost on society, depriving courts of reliable evidence, and freeing the guilty; 2) it may not in fact deter unconstitutional police conduct; 3) it may benefit a defendant in a way that is not proportional to the rights that were violated; and 4) it "compensates" only those accused of a crime.[210] In the case of *People v. Defore*, Justice (then Judge) Cardozo gave a further oft-repeated argument against the exclusionary rule that this Article mentioned previously, namely that there are other ways to enforce the Fourth Amendment such as that the police officer may "have been resisted, or sued for damages, or even prosecuted for oppression. The officer was also subject to removal or other discipline at the hands of his superiors."[211] In addition to Justice Cardozo's ways of enforcing the Fourth Amendment, Professor Akhil Amar has pointed out multiple options available to prevent constitutional violations, including *Bivens* actions, class actions, structural injunctions, administrative remedies, administrative regulation, entity liability, and attorneys' fees.[212] In addition, police departments have various other responses to officer misconduct, ranging from time off with or without pay to expulsion from the police force.[213] Different possible responses to violations of the Fourth Amendment could include criminal penalty options that already exist, such as criminal sanctions for unlawful detention, for criminal trespass, or for deliberate official misconduct.[214] Justice Scalia has pointed out that there are also an increasing number of alternative remedies including the recognition of entity liability, attorney's fees paid to Section 1983 plaintiffs, and increased police professionalism.[215]

There have been additional criticisms of the deterrence rationale outside the claim that other means may be more effective or have lower costs. Some scholars have suggested that under particular circumstances, police officers may not experience much deterrence from the rule because the exclusion of the evidence does not concern them given that they are pursuing other goals than prosecution.[216] For example, a police officer may knowingly violate the Constitution if she thinks that catching a juvenile in the act of committing a crime may enable him to get counseling or even possibly just "scare him straight". In these types of situations, exclusion will have little to no effect. "The value of the deterrence depends upon the strength of the incentive to commit the forbidden act."[217] Another circumstance under which deterrence is ineffective is if the evidence is perishable and the officer knows it is going to be destroyed. Unless the evidence is obtainable by constitutional means, exclusion of the evidence will have absolutely no deterrent effect whatsoever because either way the police are better off gathering it.[218] For example, if an officer knows or suspects that if he does not go into a house immediately, illegal drugs will be

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[210] Stewart, *supra* note __, at 1393-1396.
[211] *Defore*, *supra* note __, at 586-87.
[212] Amar, *supra* note __, at 759.
[213] Cassell, *supra* note __, at 851.
[214] *Id.* at 853.
[215] Dripps, *Exclusionary Rule Debate*, *supra* note __, at 752 (citations omitted).
[216] Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 43 (1996).
[217] Hudson v. Michigan , 547 U.S. 586, 596 (2006).
[218] Barnett, *supra* note __, at 957.

destroyed (but he does not have enough information to satisfy an exigent circumstance requirement which would allow the search), he is unlikely to refrain from entering the house simply because the drugs he finds could be excluded in court. This is especially true if he knows that it is possible that the evidence may be used in some other way, such as for impeachment purposes.

In addition to the questionable effectiveness of the rule and the existence of alternative means of deterrence, commentators have pointed out other objections to the exclusionary rule. Some jurists have noted its high costs, "including the suppression of reliable evidence, deflection of the fact finding process that often frees the guilty, diversion of attention from the central question of guilt or innocence, and the resulting disrespect for the law when evidence is excluded for minor and inadvertent Fourth Amendment violations."[219] This disrespect for the law is often referred to or characterized as the judicial integrity argument that this Article mentioned previously. While courts have to guard the integrity of the judicial process, this concern is not very effective as a justification for the exclusion of extremely probative evidence.[220] The integrity argument relies on the idea that in some ways, allowing the evidence makes the court a party to the constitutional violation. That being said, "[d]escribing the judiciary as a 'party' to the constitutional violation begs the question: what provision of the Constitution forbids the judiciary to admit illegally obtained evidence?"[221] Furthermore, the integrity argument can at least in part be rebutted if we recognize the three purposes that a judge has: 1) To do justice; 2) to protect the public from dangerous individuals; and 3) to protect everyone's constitutional rights, although these purposes are potentially in tension with one another if a judge believes that the police violated a dangerous individual's right.[222] This tension can lead to a seeming loss of integrity on the part of the courts regardless of the way in which they rule on the tainted evidence. Resolving the issue optimally is key because indiscriminate application of the exclusionary rule may cause disrespect for the law and the administration of justice generally.[223] In fact, observers have noted that the exclusionary rule may render the Fourth Amendment itself contemptible to many judges and citizens.[224] Critics have pointed out that when the public's perception is that justice has been significantly offended, that in turn can *also* damage judicial integrity.[225] Arguably, the integrity of the court could be maintained if the judge could award sanctions against the police while still using the evidence against the defendant.[226]

This argument about maintaining judicial integrity by awarding sanctions raises the question of how damages could best be structured. Shortly before the *Mapp* case, the Court construed 42 U.S.C. 1983 to permit damages suits for Fourth Amendment violations.[227] Damages may be more appropriate for at least three reasons, namely that they compensate innocent and guilty individuals; that they can be proportionate as they vary depending upon the conduct; and that they could represent a more effective form of "specific deterrence" against the officer

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[219] Rosenberg, *supra* note __, at 35 (citation omitted).
[220] Stone v. Powell, 428 U.S. 465, 485 (1976).
[221] Stewart, *supra* note __, at 1383.
[222] Barnett, *supra* note __, at 963.
[223] United States v. Leon, 468 U.S. 897, 908 (1984).
[224] Amar, *supra* note __, at 799.
[225] Trant, *supra* note __, at 709 (citation omitted).
[226] Barnett, *supra* note __, at 964.
[227] Davies, *supra* note __, at 619 n.1 (citing Monroe v. Pape, 365 U.S. 167 (1961)).

involved.[228] The use of restitution also allows both the guilty and the innocent to benefit because parties who suffered unconstitutional searches but never became criminal defendants could also sue.[229] Damages are more precise and can better protect against the risks of over-deterrence or under-deterrence because they can be calibrated to each case.[230] It is also possible to hold a municipality or other local government body liable if the unconstitutional act is based upon an official governmental policy.[231] A possible civil action against the state may be effective since it would give the victim a "deep pocket" to pursue and would incentivize the state to properly train and motivate its police officers.[232] At least historically speaking, civil trespass actions, for example, have flourished against many different kinds of government agents.[233]

Another argument against the exclusionary rule is basically that it is both disproportionate and rewards the wrong party. Jurists have said that the exclusionary rule is irrational in that it overly rewards criminals by commuting all penalties from crimes they in fact did commit while simultaneously never compensating the innocent for any of their real injuries.[234] The bottom line effect of the exclusionary rule is often to "suppress the truth and set the criminal loose in the community without punishment".[235] In fact, the court implicitly concedes that suppression is a windfall for criminal defendants.[236] The Supreme Court has stated and repeated that "[r]ejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It does nothing to protect innocent persons who are the victims of illegal but fruitless searches."[237] It gives the innocent nothing while it frees the guilty.[238] In addition to rewarding the guilty, it is also potentially ill timed and grossly disproportionate. The wrongs condemned by the Fourth Amendment's violations are completed with the unlawful search or seizure, and the exclusionary rule is not able to "cure the invasion of the defendant's rights which he has already suffered".[239] On the other hand, some commentators have suggested that while the harm may be completed and irreversible, it may not be a significant enough harm to justify the rule in the first place. Commentators have explained that the typical harms resulting from a standard wrongful house search are dignitary (but not usually massive) and may also include some mild property damage.[240] There is thus a potential disparity between the "offense", which may be a relatively small constitutional violation, and a remedy in the form of the release of a criminal. Chief Justice Burger gave the classic statement of this critique when he wrote that "freeing either a tiger or mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."[241]

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[228] Stewart, *supra* note __, at 1387.
[229] Barnett, *supra* note __, at 962.
[230] Amar, *supra* note __, at 798.
[231] Stewart, *supra* note __, at 1387.
[232] Cassell, *supra* note __, at 854 (citation omitted).
[233] Amar, *supra* note __, at 786.
[234] Ammon Straschnow, *The Exclusionary Rule: Comparison of Israeli and United States Approaches*, 93 MIL. L. REV. 57, 62 (1981) (citation omitted).
[235] Herring v. United States 55 U.S. 135, 141 (2009).
[236] Heffernan, *supra* note __, at 800.
[237] Linkletter v. Walker, 381 U.S. 618, 632 (1965) (citation omitted).
[238] Cassell, *supra* note __, at 854 (citation omitted).
[239] United States v. Leon, 468 U.S. 897, 906 (1984) (citation omitted) (White, J., dissenting).
[240] Stuntz, *supra* note __, at 894.
[241] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971) (Burger, J., dissenting).

The final objection to the exclusionary rule that this Section will discuss is the more general idea that it violates some of the basic purposes of the court and judiciary system. As the Supreme Court has said, the aims of the law are that "guilt shall not escape or innocence suffer."[242] In the application of the exclusionary rule, the exact opposite occurs, and the guilty do escape while the innocent suffer. The most basic role of the judiciary is to try those who have been properly brought before the court, to convict and pronounce a just punishment for those that are guilty, and to acquit those who are innocent.[243] A significant cost of applying the exclusionary rule is the impairment of this truth-finding function of the judge and jury.[244] Other costs in addition to this impairment are those associated with dismissed charges and a weakened position for criminal prosecutors at both the plea bargain and trial stages.[245] Some jurists have criticized the costs of the exclusionary rule to the point where they question its continued need.[246] At least to some observers, it seems clear that one evil (that of police misconduct) cannot be corrected by another evil (that of letting a guilty man go free).[247]

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

IV. The Exclusionary Rule and Corporations

A. The Fourth Amendment and Corporations

As this Article indicated previously,[248] the Constitution is silent about corporations, which is particularly understandable given that there were fewer than 400 corporations in existence during the Eighteenth Century.[249] It is likely that the Framers were not particularly concerned with the rights of these fairly rare entities. According to the U.S. Census Bureau, there were approximately six million corporations as of a few years ago.[250] Hence, the issue of corporations' constitutional status, which may not have weighed heavily on the Framers' minds, is much more significant today. Courts have already struggled with expanding corporate rights in the First Amendment context, and conflicts involving other constitutional rights are likely not far behind.[251] As many scholars and authors have pointed out, the number of prosecutions of corporate defendants by the federal government has generally increased over time,[252] and thus constitutional issues surrounding the status of corporations are more frequently litigated.[253]

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

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[242] Berger v. United States, 295 U.S. 78, 88 (1935).
[243] Straschnow, *supra* note __, at 76.
[244] *Leon*, 468 U.S. at 907.
[245] Heffernan, *supra* note __, at 825 (citation omitted).
[246] Michigan v. Hudson, 547 U.S. 586, 595 (2006).
[247] Straschnow, *supra* note __, at 77.
[248] *See supra* Section II.B.
[249] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 386 (2010).
[250] *See* U.S. Census Bureau, *Number of Tax Returns, Receipts, and Net Income by Type of Business*, https://www.census.gov/compendia/statab/2012/tables/12s0744.pdf.
[251] Miller, *supra* note __, at 956.
[252] *See* Adlestein, *supra* note __, at 443 (citation omitted).
[253] *Id.* at 376-77 (citations omitted).

> The Right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the person or things to be seized.[254]

The Supreme Court has explicitly stated that the provision of special advantages given to corporations like perpetual life or limited liability cannot be used by the state as a price for the forfeiture of constitutional rights.[255] On the other hand, there are several examples of individuals or groups that receive different constitutional protections depending upon their status, including students in public schools,[256] prison inmates,[257] members of the military,[258] and federal employees.[259] As undeniable as it is that corporations are often considered "people" under a familiar legal fiction, it is also true that this fiction exists to "to provide protection for human beings."[260] Whether a corporation gets any particular constitutional protection depends upon the nature, history, and purpose of the constitutional provision at bar.[261] The goals of the Fourth Amendment—which deal with privacy, dignity, and the ability to secure one's person, home, and papers—point toward a personal right, and if analyzed by this standard, a corporation may not be able to receive Fourth Amendment protection.[262] The Supreme Court has in fact repeatedly held that the basic purpose of the Fourth Amendment is to protect individuals' security and privacy against arbitrary invasions by government officials.[263] The Supreme Court clarified over a hundred years ago that "it is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefensible right of personal security, personal liberty, and private property."[264] Further, many would argue that "privacy wrongs differ from property wrongs because the former are irreversible while the latter are not."[265] In the corporate setting this becomes highly confusing. How can a corporation have privacy rights that are violated in the same way as a person's? It appears more likely that corporations would only suffer property right violations whose harms can be reversed through monetary compensation.

Despite the differences between individuals and corporations, the latter have at times successfully availed themselves of a variety of provisions in the Bill of Rights since the 1970s.[266] Corporations have obtained many rights, including political and commercial speech rights, negative free speech rights, rights to be free from unreasonable regulatory searches, double

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[254] U.S. CONST. amend. IV.
[255] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 351 (2010). The constitutional issue at bar was the First Amendment, specifically.
[256] *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
[257] *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977).
[258] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758. (1974)
[259] *See, e.g.*, Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 593. (1973)
[260] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).
[261] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 14 (1978).
[262] Miller, *supra* note __, at 912.
[263] Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (citation omitted).
[264] Weeks v. United States, 232 U.S. 383, 391 (1914).
[265] Heffernan, *supra* note __, at 801.
[266] Mayer, *supra* note __, at 578.

jeopardy rights, and Sixth and Seventh Amendment rights to trial by jury.[267] The Constitution gives some rights to corporations and does not confer others.[268] Even though in recent years corporations have received more and more constitutional protections,[269] there have also been cases in which the courts have denied corporations some of the rights that natural individuals have.[270] Over a hundred years ago, the Supreme Court established that there are distinctions between natural people and corporations and held in *Hale v. Henkel* that the Fifth Amendment gives personal privileges to witnesses that corporations cannot invoke.[271] More recently, some Justices specifically emphasized the point that corporations do not always have to be treated identically to natural persons.[272]

Today, it is well established that corporations or other forms of artificial entities should not receive protection under the Fifth Amendment.[273] The fact that corporations do not receive Fifth Amendment protection suggests that they also should not benefit from the safeguards of the Fourth Amendment. Given the parallels between the Fourth and Fifth Amendments—indeed, multiple Supreme Court Justices have mentioned these provisions' intimate relationship and the fact that they "run almost into each other"[274]—it would be a strange outcome to have one apply when the other does not. A serious consideration in this context is also that Fourth Amendment rights should potentially not be applied to corporations because they cannot be incarcerated, which a number of scholars believe is a crucial distinction.[275] While the existence of the possibility of incarceration is not an established requirement, it could have an impact on the evaluation of the applicability of the Fourth Amendment in various situations. Justice Marshall has stated that "because incarceration is an intrinsically different form of punishment, it is the most powerful indication whether an offense is 'serious'".[276] This suggests that courts should not necessarily grant the same level of constitutional protection when this "most powerful indication" is lacking. Notwithstanding the preceding argument, the Supreme Court has applied the Fourth Amendment to corporations and most recently explained that "extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company".[277]

In early cases, the Supreme Court established that Fourth Amendment violations could take place against individuals as well as corporations,[278] and that it applies to both criminal and civil cases.[279] The Court has stated that a corporation "plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally

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[267] *Id.* at 582 (citation omitted).
[268] Miller, *supra* note __, at 910 (citations omitted)
[269] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[270] Adlestein, *supra* note __, at 379.
[271] Hale v. Henkel, 201 U.S. 43, 70 (1906).
[272] *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part).
[273] Braswell v. United States, 487 U.S. 99, 102 (1988).
[274] *See, e.g.*, Stewart, *supra* note __, at 1373. *See also* Boyd v. United States, 116 U.S. 616, 633 (1886) (giving related examples, such as that "[f]or the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment").
[275] Adlestein, *supra* note __, at 411.
[276] Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989) (citation omitted).
[277] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014)
[278] Weeks v. United States, 232 U.S. 383, 397 (1914).
[279] Hale v. Henkel, 201 U.S. 43, 76 (1906).

clear that expectation is one society is prepared to observe."[280] The Court also pointed out that the Fourth Amendment protects commercial buildings in addition to private homes because if it did not, this "would belie the origin of the Amendment."[281] The Court has stated that under normal circumstances, a corporation should in many ways be treated the same as an individual under the Fourth Amendment in that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant".[282] The Supreme Court has made it clear that corporations are entitled to Fourth Amendment protection, but that those safeguards may differ from those provided in a purely private context.[283] "Today the corporate form legitimates the level, rather than the existence, of many corporate constitutional protections."[284] Ultimately, while corporations may be entitled to Fourth Amendment protection, the remedies might not be the same as for individuals.[285] While it is clear that businessmen should be able to go about their work in corporate settings free from unreasonable government entries similar to how people have the right against such intrusions in private residences,[286] this says very little about how a corporation should be able to vindicate that right if it is breached.

B. Applying the Exclusionary Rule to Corporations

Since the exclusionary rule is not a command of the Fourth Amendment,[287] the fact that the Fourth Amendment does apply to corporations need not mean that the rule should. The Court has made it clear that whether the rule should be applied is a different question from whether the Fourth Amendment was violated.[288] Deterring future unlawful police conduct is the primary purpose of the exclusionary rule, according to the Supreme Court.[289] In fact, the Court has gone further and held that the rule's *sole* purpose may be to deter future Fourth Amendment violations.[290] The Court has specified that the need for deterrence is a necessary condition, but not a sufficient one.[291] Therefore, even if the court could increase the level of deterrence to some extent, this would not automatically mean that exclusion would be appropriate. "[T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[292]

The Court has noted in another context that white collar crime is one of the most serious problems confronting law enforcement and that policies that would result in detrimental impact

[280] Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986).
[281] Marshall v. Barlow's, Inc. 436 U.S. 307, 311 (1978).
[282] G.M. Leasing Corp. v. United States, 429 U.S. 338, 358 (1977).
[283] *Id.* at 353 (citations omitted).
[284] Miller, *supra* note __, at 918.
[285] Braswell v. United States, 487 U.S. 99, 104 (1988).
[286] Marshall, 436 U.S. at 312.
[287] Wolf v. Colorado, 338 U.S. 25, 39 (1949).
[288] Illinois v. Gates, 462 U.S. 213, 227 (1983).
[289] United States v. Janis 428 U.S. 433, 446 (1976) (citation omitted).
[290] Davis v. United States, 131 S.Ct. 2419, 2426 (2011) (citations omitted).
[291] Hudson v. Michigan, 547 U.S. 586, 596 (2006).
[292] U.S. v. Calandra, 414 U.S. 338, 348 (1974).

on the government's efforts to prosecute this type of crime should be scrutinized carefully.[293] Given the fact that most corporate crimes are white collar crimes, the analysis is somewhat weighted against exclusion from the beginning even though both federal and state courts have expressed some concern over the failure of other remedies to fully protect the rights given by the Fourth Amendment.[294] Nevertheless, none of these past decisions were addressing actors with the particular characteristics of corporations, including their greater ability to defend themselves in judicial proceedings.

In *Weeks*, the Court went as far as to state that without the remedy of suppression, "the protection of the Fourth Amendment . . . is of no value."[295] This becomes more complicated in the corporate context, in which evidence could be suppressed for purposes of individual prosecutions (thus giving value to the Fourth Amendment) without necessarily doing so for corporate prosecutions. So even if one adopts one of the earlier and stronger formulations of Fourth Amendment protections, such as the one in *Weeks*, the argument in favor of suppressing the evidence against a corporation is weaker than in other situations. More recently, the Supreme Court has explicitly stated that a determination of the applicability of the exclusionary rule proceeds via a cost-and-benefit analysis of the specific circumstances.[296] Seemingly small differences in fact patterns can warrant exclusion or not, a question whose answer could even turn on whether one's attorney objected to the evidence at the trial or before the trial.[297] The Supreme Court has made it clear that only appreciable deterrence would justify use of the rule.[298] The idea is that an exception to the exclusionary rule should be created whenever the deterrent benefits are minimal or unclear.[299] Furthermore, it is not the case that simply showing deterrent value would require use of the exclusionary rule; rather, courts must still weigh the costs and benefits.[300] Other scholars have argued that the exclusionary rule should apply differently to different types of defendants.[301] Corporations have several unique attributes that set them apart from individual defendants and make the use of the exclusionary rule inappropriate most of the time.

Many of the concerns that prompted use of the exclusionary rule are not present or are significantly reduced in corporate criminal settings; for example, the use of "brutal means" to coerce information about evidence was a partial motivator for use of the rule in some cases,[302] a problem that is highly unlikely to arise in the corporate context. Not only is there no "body" to brutalize in the traditional sense, but the types of crimes that corporations may have committed (while potentially very damaging) are also not the kinds that typically inflame police officers' passions. Related to this lack of a corporeal form is the fact that corporations cannot be incarcerated and, hence, some form of fine is the only possible outcome for corporate prosecutions. Historically, early courts rooted the exclusion of various types of evidence in the

[293] Braswell v. United States, 487 U.S. 99, 115 (1988).
[294] *See* Linkletter v. Walker, 381 U.S. 618, 633 (1965) (citations omitted).
[295] Weeks v. United States 232 U.S. 383, 393 (1914).
[296] *Id.* at 907.
[297] Stewart, *supra* note __, at 1375.
[298] *Leon*, 468 U.S. at 909 (citation omitted).
[299] Dripps, *Exclusionary Rule Debate*, *supra* note __, at 749 (citations omitted).
[300] Alderman v. United States, 394 U.S. 165, 174 (1969).
[301] See *generally* Rosenberg, *supra* note __.
[302] *Id.* at 34.

"jealous regard for the liberty of the individual."[303] These circumstances are very different when there is no individual and "liberty" is not in question.[304]

In *United States v. Janis*,[305] the evidence illegally obtained against an individual was excluded at the state criminal trial, but was used in the subsequent civil tax proceeding.[306] The court felt that the deterrence achieved by exclusion from the criminal trial was sufficient while exclusion from the civil proceeding was not necessary.[307] This parallels the argument that this Article made above that illegally obtained evidence could be excluded from individual prosecutions (those that may result in incarceration) but allowed in corporate prosecutions, the latter of which could only result in monetary fines or their equivalent. Often the more dramatic or serious the offense, the more likely police officers are to adhere to constitutional rules and avoid exclusion.[308] Hence, it is not clear what additional deterrence occurs if the corporation could be convicted since it seems likely that officers would still want individuals to go to jail and would therefore experience a level of deterrence from actions that could result in exclusion and failed convictions. Because courts are supposed to use a cost-benefit analysis in this area, pursuing corporations in that manner is likely appropriate on balance.

Scholars have pointed out that the exclusionary rule usually protects relatively powerless defendants.[309] Corporations, however, are typically not powerless. A possible example of corporate power is the fact that in the fifty years following the establishment of corporations' rights under the Fourteenth Amendment, less than one-half of one percent of all Fourteenth Amendment litigation was used to seek protection for African-Americans (who were supposed to be important beneficiaries of the amendment) while more than fifty percent of this type of litigation dealt with the protection of corporations.[310]

It is also possible and even probable that police officers behave differently towards individuals depending on how likely specific individuals are to seek recourse.[311] Therefore, since corporations have significant resources to pursue other remedies, police officers would already be less likely to violate their rights. A challenge faced by those who pursue damages awards is the difficulty of finding and paying for an attorney,[312] which is generally much easier for a corporation. Other remedies may be more available to corporations as well, such as injunctions against the agencies that violated the law. This remedy is ultimately slight due to the fact that the entity seeking the injunction has to show the likelihood of future injuries due to the illegal practice, and this is often difficult for a plaintiff to accomplish.[313] At the same time, corporations would be far more likely to be able to show this than would individuals, so this alternative may be more feasible in the corporate context. Showing future injuries can be done in multiple ways. For example, a police search of a corporation's premises will almost certainly disrupt business

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[303] People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901).
[304] Most blatantly, a corporation cannot be placed in jail.
[305] 428 U.S. 433 (1976).
[306] *Id.* at 459-60.
[307] *Id.* at 454.
[308] Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 132 (2003).
[309] *Id.* at 129 (citation omitted).
[310] Mayer, *supra* note __, at 589 (citation omitted).
[311] Dripps, *Exclusionary Rule Debate*, *supra* note __, at 771.
[312] Stewart, *supra* note __, at 1387.
[313] *Id.* at 1387.

activities and cause a loss of productivity as well as possible reputational harm, which may translate to lost stock value.

Another example of corporations' increased power can be observed in their level of political connections. Scholars have asked the question: "Are today's politicians more likely to impose effective 'direct sanctions' against the police than the politicians of yesteryear"?[314] When it comes to situations involving corporations or possibly unions, the answer to this question is likely yes. It is well known that corporations are heavily involved in politics and make financial contributions that would certainly give them an increased ability to affect politicians compared to the typical criminal defendant. A possible counterargument to corporations having more power than individuals is that corporations have a strong incentive to and in fact often do cooperate fully with the government when investigations are conducted.[315] Most corporate defendants plead guilty when charged with a crime.[316] Yet, the fact that corporations' power is not absolute does not negate that it is increased. The increase is the relevant factor in the balancing test and weighs on the side of not excluding evidence.

Another basis for not excluding evidence in corporate prosecutions are the multiple ways that the level of harm tends to be greater in those kinds of cases. The easiest method to see the increased harm is simply to understand that corporations are very inclined to continue committing crimes, and hence failing to stop them is more detrimental than failing to stop other defendants who may or may not continue committing crimes and hurting innocent people. Researchers have noticed a high level of consistency in corporate behavior, meaning that corporations tend to act either ethically or dubiously on a regular basis,[317] and they often engage in the same or very similar offenses repeatedly. Some scholars have even argued for applying a "three strikes" rule to corporations in an attempt to address recidivism.[318]

In the same vein, when considering the harm caused, one must take into account the fact that the size of many corporations and their potentially widespread misconduct may contribute to increased harm when compared with the discrete behaviors of individual actors.[319] Different actions taken in remote locations within a corporation can combine to result in more harmful consequences than the individual conduct would seem to indicate.[320] In many exclusion cases, the court deals with a completed crime. In corporate settings, the likelihood that the crime will continue is higher. Therefore, the use of evidence is more likely to put an end to existing and recurring crimes for corporations, and thus the value of evidence is potentially larger than in many other settings. Correspondingly, suppressing this evidence comes at a higher cost in corporate scenarios.

Another detriment to allowing corporations to use the exclusionary rule stems from the type of evidence that is needed for successful corporate prosecutions, which primarily relates to the so-called collective knowledge doctrine. The idea behind this doctrine is that there can be criminal liability where knowledge of a number of employees is aggregated and imputed to the corporation to form a single mens rea,[321] which would be much more difficult to accomplish if

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[314] Kamisar, *supra* note __, at 127.
[315] Hasnas, *supra* note __, at 523.
[316] Adlestein, *supra* note __, at 380.
[317] Ripken, *supra* note __, at 134; Kim, *supra* note __, at 800.
[318] *See, e.g.*, Ramirez, *supra* note __, at 942.
[319] *See* Sheley, *supra* note __, at 258-59.
[320] *See supra* notes __-__ and accompanying text (discussing the Massey Energy case).
[321] Cole, *supra* note __, at 66.

Fourth Amendment violations against a single person could defeat all of the charges. "If employee A knows one facet[,] . . . B knows another facet[,] . . . and C knows a third facet of [a crime], the bank knows it all."[322] If B can have the information excluded, then the defendant (the bank in this example) could not be prosecuted. Furthermore, corporations purposefully engage in compartmentalization,[323] which would make possible prosecutions even more difficult. At the end of the day, a further advantage of not allowing exclusion is the ability to minimize possible abuse of the corporate form. As judges have pointed out, there are situations in which this form may help to insulate property and protect criminal individuals.[324] If criminals are aware of possible *increased* exposure due to the corporate form, they may be less inclined to use/abuse it.

The final reason for not excluding evidence in corporate settings is only indirectly connected to the deterrent focus of the rule and rather addresses the secondary question of public perception. A number of scholars have argued that after *Leon*, some began viewing the exclusionary rule as an evaluation of the possible moral culpability of the police, which served to increase the public's confidence in the legitimacy of the law enforcement process.[325] On the other side, however, is the issue of moral condemnation in relation to corporate criminal liability.[326] Some have argued that the exclusionary rule fulfills the same role in law enforcement settings as criminal prosecutions do in corporate settings, i.e., expressing condemnation.[327] Erroneous fact finding caused by exclusion of reliable probative evidence may affect not only the parties to the trial but also the public at large in that society could lose confidence in the court system. Therefore, even if we accept the argument that the expression of condemnation is an important part of the role of the judiciary in this setting, this cuts both ways when it comes to the question of whether to maintain the exclusionary rule in its current form. Being able to fully express moral condemnation against the police may come at the cost of fully doing so against corporations (if evidence gets thrown out), and vice versa. Given the fact that four current Justices have favorably mentioned abolishing the exclusionary rule altogether,[328] the proposal in this Article may find favorable reception in at least some courts and possibly eventually even the Supreme Court.

C. General Proposals to Change the Rules

As the previous Section demonstrated, even if one concedes that the Fourth Amendment applies to corporations, that does not imply that the exclusionary rule should also apply. There are several strong arguments against having it apply or at least having it apply in the same way as to natural people. Many people thought that the rule was going to be completely abolished in the 1970s when courts emphasized the deterrence rationale and started imposing limitations.[329] Another possibility that falls short of total elimination of the rule and that is exercised in other countries would be to admit all relevant evidence and accord it more or less weight depending

[322] United States v. Bank of England, 821 F.2d 844, 855 (1st Cir. 1987).
[323] *Id.* at 856.
[324] *See, e.g.*, United States v. One Parcel of Land, 965 F.2d 311, 323 (7th Cir. 1992).
[325] Taslitz, *supra* note __, at 485.
[326] *Id.* at 486.
[327] *Id.* at 487.
[328] Davies, *supra* note __, at 619 (citation omitted).
[329] *Id.* at 633.

upon the circumstances.[330] It may not even be necessary to go this far in the corporate setting, however. Scholars have argued since at least the early 1970s that the rule should be cut down in scope and reserved for use in truly flagrant cases.[331] A similar understanding could be adopted for the use of the rule in corporate criminal prosecutions today.

There have also been other proposals for limiting the exclusionary rule.[332] One possibility would be to constrain its use to situations involving "serious crimes",[333] but obviously this could lead to only serious criminals getting away and may not only highlight some of the costs discussed previously but also alienate public support for the rule. Some have argued that when courts consider excluding evidence, they should take into account multiple factors such as the gravity of the offense relative to the extent of the law enforcement misconduct; the state of mind of the officer committing the misconduct; the location of the search (i.e., as related to the reasonable expectation of privacy); and the character of the defendant subjected to the illegal search.[334] Hence, the severity of the "substantive mistake" can be used to determine if exclusion is appropriate.[335]

If this type of model were adopted for corporations, evidence could still be excluded if the circumstances were extreme. Indeed, some kinds of searches may be acceptable as a rule, but the specifics of particular cases may shock the conscience to such an extent that fundamental fairness mandates the exclusion of evidence obtained that way.[336] Some scholars have pointed out that in many contexts, the Supreme Court is unlikely to apply the exclusionary rule except under significant governmental incursions that rise to the level of shocking the conscience.[337] This same type of analysis could be used in the corporate criminal setting. The default would be that evidence found during an illegally conducted search would be admissible in a prosecution against the corporation but inadmissible against any individuals, plus corporations could seek other remedies for the constitutional violation such as damages. Nonetheless, this default could be overcome if there were any particularly egregious actions (like knowing or intentional constitutional violations, or repeated violations by a particular agency) on the part of the government, and exclusion would then apply.

V. Conclusion

This Article argues that the exclusionary rule should not apply to corporations the same way that it does to natural people. The default should consist of having any evidence discovered in violation of the Fourth Amendment admitted for purposes of prosecuting corporations. This same evidence should be excluded from any prosecutions against individuals involved in the criminal activity, and corporations should be free to pursue any alternative remedies that may be available. This Article shows that there are significant reasons to refuse to apply the Fourth Amendment to corporations given that it is supposed to protect personal rights that are a poor fit for artificial entities. While recognizing the Supreme Court's longstanding protection of

[330] Straschnow, *supra* note __, at 57.
[331] *Id.* at 61 (citation omitted).
[332] Cassell, *supra* note __, at 847.
[333] *Id.* at 848 (citation omitted).
[334] Straschnow, *supra* note __, at 78-79.
[335] Taslitz, *supra* note __, at 518.
[336] Rosenberg, *supra* note __, at 56.
[337] *Id.* at 33.

corporations under the Fourth Amendment, this Article argues that at least the exclusionary rule itself need not apply to them. Corporations are more capable of protecting themselves and more likely to cause harm to others. Further, since the Supreme Court has repeatedly stated that application of the exclusionary rule is a remedial action based on a fact-specific cost-benefit analysis[338] and the facts about corporations weigh heavily against excluding evidence, the default rule should be that exclusion is inapplicable in the corporate setting. The quest for truth and justice should be the main goals of our judicial system, and the adoption of the proposal in this Article accomplishes both of these goals.

[338] *See supra* Section III.A.