Tip-Based Warrantless Searches and Seizures Under the Rubric of the Investigative Detention Exception to the Warrant Requirement: What Law Enforcement Personnel Must Understand About Exclusion and Training

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

Introduction to the Fourth Amendment: Foundation and Current Applicability Within the Broader Scope of Constitutional Law

The absolute protection of the fundamental rights of individual citizens of the United States of America is one of the most important, and hence, often debated goals of a constitutional form of government. In fact, it has regularly been stated by highly regarded historians that “[e]very system of constitutional government worthy of the name embodies ... a ‘system of ordered liberty,’ in which the people are guaranteed certain fundamental rights and immunities against the exercise of arbitrary power by the state.”

Subsequently, we ask ourselves the inevitable follow-up question: just what are these fundamental rights, safeguarded by notions of due process and fundamental fairness, that constitutional historians and courts across the nation speak of day in and day out.

Strictly speaking, the fundamental rights of “Life, Liberty and the pursuit of Happiness,” as stated in the Declaration of Independence, give rise to a host of implicit and explicit privileges and guarantees under the entirety of this nation’s constitutional foundation. Nearly 184 years ago, Daniel Webster uttered a statement in the enduring case of Dartmouth College v. Woodward that still guides the application of ordered liberty and due process to constitutionally protected rights and guarantees to this very day. Webster stated:

By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under

1 J.D. University of Richmond T.C. Williams School of Law 2004; B.S. Political Science, Summa Cum Laude, Old Dominion University 2001; B.S. Criminal Justice, Summa Cum Laude, Old Dominion University 2001.
2 U.S. Const. amend. IV.
4 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
5 17 U.S. (4 Wheat.) 518 (1819).
the form of an enactment, is not, therefore, to be considered the law of the land.  

Webster’s statement provides a source of direction for constitutional scholars, officers of the courts of the United States, and members of the legislative branch to analyze and apply the true and accurate meaning of life free from governmental overreaching.

Webster understood, as we all should, that it is more than impossible to draft any rule, regulation, or statute that can adequately describe all of the protections to which persons should be entitled as citizens of the United States. Situations are too numerous and scenarios too multifaceted to provide Americans, via the written word, with a specific reference to all the aspects of our lives that should be safeguarded as necessary to live freely, happily—and with assurance that the government will not unwarrantedly invade into the realm of our private being. It has been the judiciary’s duty, therefore, to define and continually refine the limits of police power and provide our nation’s inhabitants with some sense of daily security and protection. The Court has done so through its power of constitutional interpretation and ability to determine and proscribe just “what the law is.”

In 1791, the Bill of Rights was added to the then-existing form of the United States Constitution. Encompassing the first Ten Amendments, the Bill of Rights was adopted by our Founding Fathers in order to further the interest of protecting individual freedoms from intrusion by the federal government. To that end, the United States Supreme Court, in Barron v. Mayor of Baltimore, stated that “[t]he Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.” Hence, each state was originally left to construe their own constitutions and include their own ideas of what was necessary so as to protect individual persons from the police power of state officials. It became important in the eyes of those who were once subjected to the unchecked powers of England to provide some notion of freedom for each state to govern its territory as it saw fit, yet also foster a feeling of continuity and expectancy among the American people.

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6 Id. at 581; see also, LUCIUS P. MCGHEE, STUDIES IN CONSTITUTIONAL LAW: DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 49-52 (1906) (discussing the general definition of due process of law in relation to the concepts of ordered liberty).
7 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and the duty of the judicial department to [s]ay what the law is.”).
9 Id. at 247.
10 Id. at 247-48. This ideology was held to be the norm until the Twentieth Century, when the notion of “incorporation” began to invade the Supreme Court’s docket. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the due process clause of the Fourteenth Amendment extended to the states the Fourth Amendment right against unreasonable searches and seizures and applied the exclusionary rule to state prosecution).
It is through this notion of incorporation that the protections afforded to United States citizens through the Bill of Rights, both implicit and explicit, became applicable to state action. Eventually, the United States Supreme Court, in 1964, determined that the guarantees of the Bill of Rights are “all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” 12 Chief among those guarantees, is the right of individuals not to become the subject of an unreasonable search and seizure, in relation to their “persons, houses, papers, and effects” 13 at the hands of either state or federal governmental officials. 14 However, a strict and concrete answer to the issue of just what an unreasonable search or seizure constitutes continues to elude the grasp of the nation’s law enforcement officers and pervades the docket of criminal courts around the nation. This uncertainty stands despite the more than 210 years of litigation on this specific question.

With the idea of the presiding government issuing unruly General Warrants fresh in the minds of our founding fathers, it was deemed vitally important to include some requirement of particularity and specificity in the language of the Fourth Amendment. 15 However, it was quickly determined that: 1) the issuance of warrants could be, and would be, the subject of abuse in its own right, whether by magistrates or the governmental officials applying for said warrants; and 2) in order for police power to function efficiently, there needed to be certain exceptions to the warrant requirement. 16 Despite these ideas, the use of warrants in conjunction with the search and seizure of an individual has proven to serve a multitude of functions. First and foremost, the requirement protects the subject of the warrant from an undue intrusion on his or her privacy interests. 17 That is, the need for police authority to obtain a warrant from an impartial judicial officer seeks to ensure that the government will not burden one’s right to be left alone in some illogical manner. The warrant requirement further “assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope.” 18 Last, but certainly not least, the issuance of a warrant prior to the search or seizure of a person and his property provides, to the individual, a guarantee that the conduct on the part of the officer is being commenced at the order of a fully-informed, yet sufficiently removed and objective, magistrate. 19

Although there has been a long held Supreme Court penchant for the use of warrants in every-and-all types of search and seizure situations, 20 time and reason have

13 U.S. CONST. amend. IV.
14 Malloy, 378 U.S. at 10.
16 Id.
17 Id. at 621-22 (“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.”).
18 Id. at 622.
19 Id.
20 See United States v. Leon, 468 U.S. 897, 913-14 (1984) (“Because a search warrant ‘provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than
carved out certain exceptions to this necessary step in state and federal criminal procedure. 21 That is lawfully issued warrants presumably provide officers with the reasonableness necessary in commencing a search and seizure. 22 However, this is not to be interpreted to mean that all warrantless searches and seizures are unreasonable.

For purposes of this paper, there will be a focus on police behavior in relation to the search and seizure of an individual absent the issuance of a warrant from the proper judicial authority. The paper will spotlight the topic of investigative detentions initiated by law enforcement officers without a warrant and will turn on what showing officers of the law need to make in order to justify conducting such detentions. Further, the paper will explore police officer training in light of current Supreme Court and state court actions and the use of the exclusionary rule in modern police practice.

General Exceptions to the Warrant Requirement of the Fourth Amendment with a Focus on “Investigative Detention”

Just as hearsay evidence is frequently admitted by courts upon the proper application and argument of the exceptions to the hearsay rule, 23 most searches and seizures fall within the scope of one of the various exceptions to the warrant requirement. 24 In Katz v. United States, 25 the Court held that if federal or state officials commence a search and seizure without the issuance of a warrant for said search, and if the action does not fall within the safeguards of one of the “specifically established and well-delineated exceptions,” then the search and seizure will be deemed to be “per se unreasonable” under the Fourth Amendment. 26 It is vitally important, then, that all law enforcement officers become intimately associated with these exceptions and with what is judicially required of them in applying the exceptions to the particular situations that they may be confronted with. This begs two separate, but related, questions: 1) What are the exceptions to the warrant requirement? 2) Can society realistically expect its law enforcement personnel to comply with the requirements laid down by the courts concerning application of the exceptions? Inevitably, the answer to the latter question is an emphatic “Yes.”

The exceptions to the search and seizure warrant requirement to which the Katz Court refers have come to include the following: Plain View; 27 Search Incident to Legal

the hurried judgment of a law enforcement officer “engaged in the often competitive enterprise of ferreting out crime,” we have expressed a strong preference for warrants.”) (internal citations omitted).

22 See Leon, 468 U.S. at 914 (“We have ... declared that ‘in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.’” (quoting United States v. Ventresca, 380 U.S. 102, 106 (1965)).
24 RUSSELL L. WEAVER ET AL., CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES 107 (2001). (“In short, while only a relatively few exceptions to the warrant requirement exist, most searches fall within these exceptional categories.”).
26 Id. at 357.
27 Horton v. California, 496 U.S. 128, 136-7 (1990) (explaining that police may seize evidence in plain view where: 1) they are lawfully present at the location of the evidence; 2) they have lawful access to the
Arrest; 28 Automobile Exception; 29 Inventory Exception; 30 Consent; 31 Administrative Inspections; 32 Exigent Circumstances; 33 and, the focus of this paper, Investigatory Detention (Stop and Frisk).

One of the most intriguing and oft-questioned exceptions to the warrant requirement is the one that establishes a law enforcement agent’s authority to stop and frisk (i.e. briefly detain an individual for further investigation) a suspect without the objective and removed approval of a judicial officer. Courts around the country deal with this issue on a daily basis. Time and again, courts turn to the express language utilized by the Warren Court in Terry v. Ohio 34 for some symbol of guidance in reaching decisions based on the wide variety of circumstances that may be confronting them on their particular docket. Specifically, Terry provided the rule that prior to any detention of an individual for investigatory purposes, the officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, evidence sought to be seized; and 3) the illegal character of the evidence is immediately apparent to the officer); cf. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

28 New York v. Belton, 453 U.S. 454, 461 (1981) (holding that, after custodial arrest and without probable cause or reasonable suspicion that individual is armed or in possession of evidence, police may search the individual’s person without a warrant).

29 California v. Carney, 471 U.S. 386, 391 (1985) (stating that because of inherent mobility of vehicles and reduced expectation of privacy therein, the Fourth Amendment does not require officers to have a warrant to search a vehicle where there is probable cause to believe that it contains evidence of illegal activity).

30 Colorado v. Bertine, 479 U.S. 367, 372 (1987) (explaining that once police lawfully detain property, they may conduct a warrantless search of the property for three reasons: 1) protection while in police custody; 2) insure against claims of lost, stolen, or damaged property; and 3) protect police from possible danger). See also Illinois v. Lafayette, 462 U.S. 640, 646 (1983).

31 Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (“[W]hen the subject of the search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances.”); see also Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (stating that consent is based on an objective standard: “[W]ould the facts available to the officer at the moment ... "warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).


33 Police may commence a warrantless search and seizure when justified to do so by exigent circumstances. Such circumstances are present where there is probable cause for search and seizure and the safety of officers or others is at issue, there is an imminent danger of destruction of evidence, police are in hot pursuit of a suspect, or suspect is likely to escape before it would be feasible for an officer to obtain a warrant. See Cupp v. Murphy, 412 U.S. 291, 294-96 (1973) (fear of destruction of evidence coupled with probable cause to arrest); see also Minnesota v. Olson, 495 U.S. 91 (1990) (the need to prevent suspect from escaping); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (pursuit of armed robber suspect into house where delay would be dangerous to officers and others); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (evidence of blood-alcohol content). But see Rochin v. California, 342 U.S. 165, 172 (1952) (forced removal of stomach contents is conduct shocking to the conscience that goes beyond bounds of exigent circumstances).

34 392 U.S. 1 (1968).
reasonably warrant the intrusion." These facts must be objectively judged in light of the totality of the circumstances present at the time of the detention of the individual. If there is no objective basis leading to the officer’s ability to form a reasonable and articulable suspicion that criminal activity has been, is about to be, or currently is afoot, any evidence seized during the course of or in furtherance of the investigatory detention will be excluded under the theory of the judicial exclusionary rule. Many cases have arisen that have tried to tweak and further define the meaning of the words articulated in Terry, but the general propositions still hold true. Basically, minus a minimal showing of reasonable and articulable suspicion, a standard far inferior to probable cause, an officer of the law may not, under the Fourth and Fourteenth Amendments, intrude on the privacy of an individual by means of effectuating a detention of his or her person for purposes of investigating possible criminal activity. If there is an unlawful detention and subsequent search of the individual’s person, any evidence seized will be excluded as being the product of an unlawful encounter.

Terry v. Ohio and Progeny in Modern Criminal Procedure: Purposeful Circumvention of the Fourth Amendment or a True Lack of Understanding on the Part of Those Persons Choosing to Protect a Freedom-Loving Nation?

With the advent of increased community policing tactics such as “tip hot-lines,” “crime-lines,” and other mechanisms used to induce citizens to become actively involved in safeguarding their neighborhoods and their own well being, as well as the often used inducement of plea agreements, the world of modern criminal procedure has, in part, turned on reliance upon third-party information. This third-party information, often taking the form of a “tip,” is frequently produced anonymously, but can also be provided to law enforcement officials by fellow officers of the law or criminals “in the know.” Regardless of the form, it is no doubt that such information has become a key aspect in police departments’ crime-solving arsenal. In interpreting the remainder of this paper, therefore, the reader should consider the following tip-based scenarios, placing themselves in the position of the citizen at issue and evaluating the conduct of the law enforcement personnel:

Scenario 1: On your way home after a long day of work, you decide to stop and grab some fast food. It is 8:00 p.m., your favorite television show comes on in a half hour, and you just don’t feel like cooking tonight. You pull your car into the closest Boca Queen fast food restaurant, as you told your co-workers you would do before you left for the evening. Just as you are stepping out of your car, two undercover police officers, Detectives A and B, with badges displayed, walk up to you. Detective A looks you in the eye and claims that the officers received

35 Id. at 21.
36 Id. at 21-22.
37 Id. at 12-13; Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("[T]he admission of the new constitutional right [against unreasonable searches and seizures] could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."); Weeks v. United States, 232 U.S. 383, 392 (1914).

92
information that you were transporting drugs in your car. You ask the detectives if that is why they approached you and their response is, “That is the only reason.” You then consent to their search of your vehicle and personal belongings. As it turns out, someone informed the police that a person with your exact physical description would be at the Boca Queen just after 8:00 p.m., driving the exact make, model, year and color of the car you drive, with some of the same letters/numbers in the license plate. That same individual claimed that the person they described would be carrying narcotics.

Scenario 2: You and a long-lost relative are reunited and find time to catch up over a nice dinner at a local restaurant. Unbeknownst to you and your relative, two uniformed police officers, C and D, are off in the corner watching you. The entire time you are being observed neither you nor your relative act in any manner that would indicate criminal activity is afoot. While enjoying your meal and catching up on lost time, these two police officers approach you and your relative and immediately state, “Someone reported that you two have weapons.” Without uttering a word in response, Officer C demands that you put your hands out in front of you and stand up from the table. He sees what appears to be a bulge in one of your pockets, feels it, and proceeds to pull the item out. After all is said and done, you ask why the officers did this, to which Officer C replies, “An off-duty cop who happened to be in the restaurant eating when you and your relative arrived said that you two were boisterous, loud, and that you had what appeared to be something heavy in your pocket.”

Scenario 3: One afternoon, you and a few friends are legally standing around on the corner near your house, just shooting the breeze, when all of the sudden two uniformed law enforcement officers, E and F, explaining nothing to you, approach and demand that you put your hands up in the air. Once you comply, one of the officers proceeds to rub his hands over your clothing. Officer E then reaches into one of your pockets and proceeds to pull out what she thinks could be a firearm. After the encounter is over, Officer E explains to you that she did this because, just minutes prior, she received an anonymous tip that a person matching your physical description was standing around, near your location, with a group of people and was carrying a gun.

Time and again, situations like these occur in all of the judicial systems across the country. As they come up, one common theme dominates the ensuing proceedings: there must be a balancing of the government’s need to search and seize against the privacy invasion that is the hallmark of the search and seizure.\(^\text{38}\) What this language boils down to is a long-time practice of providing police with the ability to conduct certain investigative detentions with some form of proof less than probable cause (reasonable and articulable suspicion) without the need for obtaining an authorized warrant. As a

\(^{38}\) Terry, 392 U.S. at 26; see also Camara, 387 U.S. at 534; Delaware v. Prouse, 440 U.S. 648, 654 (1979) (“[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”).
result of the wide variety of scenarios relating to search and seizure that may confront law enforcement officers, the judiciary has crafted well-articulated language that officers are to abide by prior to effectuating an investigative detention of one’s person. It is this language that is to provide officers with the appropriate balancing test so that a split second determination of whether to proceed with the detention will be lawfully recognized.

First, this requisite objective level of reasonable and articulable suspicion must be determined in light of the totality of the circumstances confronting the involved parties at the time the investigatory detention took place.\(^{39}\) Second, in forming reasonable and articulable suspicion, the officer must be able to pinpoint precise and distinct factors that, when considered with the inferences that a rational officer could perceive there from, would warrant the belief that criminal activity was afoot, was imminent, or had already occurred.\(^{40}\) Lastly, concerning the area of reasonable and articulable suspicion derived from information emanating through a tip, it is to be noted that the tip alone may provide the officer utilizing the tip with reasonable and articulable suspicion so as to conduct an investigatory stop, but only if the officer determines that the tip displays “sufficient indicia of reliability.”\(^{41}\) If there is no showing of reliability, then the police can only utilize that tip under the auspices of the totality of the circumstances in determining whether or not reasonable and articulable suspicion exists. In either situation, what is of immense importance is what the officer knew at the time of and prior to the detention. What the officer learns after the detention cannot validate his or her actions.

Overall, “[c]ourts assess the reliability of an informant’s tip on a sliding scale: greater corroboration [by those utilizing the tip] will justify acting on a tip from an informant of uncertain or unknown trustworthiness, while a lesser showing [of reliability] will suffice if the information is from a known source.”\(^{42}\) The key to tip-based law enforcement activity, like most conduct acted upon under the rubric of the Fourth Amendment, from the very reception of the tip to acting in reliance thereon, can be

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40 Terry, 392 U.S. at 21.
41 Alabama v. White, 496 U.S. 325, 328 (1990) (quoting Adams v. Williams, 407 U.S. 143, 147 (1972)) (holding that reasonable, articulable suspicion to conduct investigatory detention was present, although a “close case,” where police corroborated information in tip stating that defendant would be leaving a particular apartment at a particular time in a particular vehicle, traveling to a particular hotel, and carrying narcotics); United States v. Harris, 39 F.3d 1262, 1269 (4th Cir. 1994) (holding that reasonable, articulable suspicion to conduct investigatory detention was present, where known reliable informant provided description of vehicle, suspect, and properly predicted future behavior).
42 Jeffrey Haningan Kuras et al., Thirty-First Annual Review of Criminal Procedure, 90 GEO. L.J. 1130, 1136-37 (2002) (internal citations omitted); see also Florida v. J.L., 529 U.S. 266, 271 (2000) (holding that an anonymous tip referencing a person’s physical appearance, location, and notion that the individual was carrying a weapon, with corroboration of the appearance and location, alone, is not enough to provide officer’s with reasonable, articulable suspicion); White, 496 U.S. at 332 (“[U]nder the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability...”); Adams, 407 U.S. at 148 (holding that informant’s information was reliable based on police corroboration and fact that the informant was reliable in the past); United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000) (explaining that tip provided to police in face to face encounter was more likely to provide reasonable articulable suspicion than an anonymous tip because the nature of the encounter between tipster and police gave police chance to evaluate reliability of informant).
summed up on one simple word: “reasonable.” More likely than not, a court will validate a search and seizure if the officer(s) acted reasonably. That is, society, in general—and the judiciary of the United States, in particular—asks only that our law enforcement personnel act as reasonable police officers in their position would when faced with the exact situation. This is quite a lenient standard considering the reality that the factual situation, whatever it may be, is meeting head on an issue of huge constitutional proportion.

It only makes sense that courts view these elements of reasonableness in light of the specific facts of the situation that is at bar. Thus, although there are self-defining elements that have been explained, tweaked, and thoroughly defined by the courts over the years, there exists no bright-line rule that an officer can abide by in determining when, if at all, he or she has reasonable and articulable suspicion to investigate possible criminal activity before they intrude on a citizen’s Fourth Amendment interests. Just as it is impossible to draft a legislative enactment defining all of the situations in which a citizen has an expectation against governmental intrusion, so is it an impossible duty of the judiciary to create precise guidelines defining when, where, how, and under what circumstances an officer would be acting reasonably by stopping and detaining a person in order to conduct an investigatory detention. It is important, then, that before acting, the officer ask himself/herself, “Based on the information that I know, how would one of my fellow officers respond?” If the answer to this question is in the negative, then it is pertinent that the officer understands that the balancing test of governmental versus private interests is then tipped in favor of upholding citizen’s privacy.

Even with the language and guidance provided by the courts dictating that officers are only to search and seize based on an informant’s tip when reasonable to do so, situations like scenarios 1, 2, and 3 are commonplace in today’s world. Each one of the above situations was adapted from actual judicial proceedings, which, as of the date of the writing of this paper, the courts have held that there was police abuse of discretionary authority in detaining, searching, and seizing the individual and items from the person of the detained citizen. In each case, the court utilized the exclusionary rule so as to disregard any evidence that was deemed to be the fruit of the unlawful search.

Scenario 1 was represented in Davis v. Commonwealth. The state appellate court reasoned that as soon as Detective A insinuated that Davis was a suspect in his eyes, there was a seizure for purposes of invoking Fourth Amendment protections by merely stating to Davis that they received information that she was transporting drugs.

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43 See Florida v. Royer, 460 U.S. 491, 506-07 (1983) (“...there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.”).
44 See Terry, 392 U.S. at 21-22 (“[I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?”) (quoting Carroll v. United States, 267 U.S. 132 (1925)).
46 Id. at 431-32.
In other words, any reasonable person in the position of Davis, at the moment of confrontation with the officers, would have felt as if they were not free to proceed about his business. The problem is that this detention was based on no more than the corroboration of Davis’s physical description, location, and timing, as illustrated in the anonymous tip received by the officers.

The court is not particularly troubled by this police action, although a violation of the Fourth Amendment itself, until the moment the detectives move one step further and attempt to seize evidence from Davis. Although the detention is not valid, it is the subsequent search that makes the detention interesting from a constitutional standpoint. It is apparent that the court is bending as far as judicially possible in hopes of finding some reason to validate the ensuing search and seizure. However, a court can only stretch so far in finding that Detectives A and B acted as reasonable officers would have in their positions. Detective A, in the scenario, attempts to moot the illegal seizure by asking Davis for consent to a search of the automobile. However, the court goes on to say that “[w]hen trying to establish that there was a voluntary consent after an illegal stop, the [prosecution] has a much heavier burden to carry than when the consent is given after a permissible stop.” Normally, it is only necessary for the prosecution to show that consent was provided voluntarily by the citizen and was in no way connected to any coercion on the part of police action. However, when consent is obtained after an individual is detained and when that detention is made prior to any demonstration of reasonable and articulable suspicion, the standard of showing voluntary consent is raised—and justly so. The court looked to the totality of the circumstances and considered, in addition to Davis’s consent itself: 1) the proximity in time between seizure and consent; 2) any intervening circumstances; 3) Davis’s subjective awareness of a right not to consent; and 4) deliberateness of the police misconduct. Ultimately, the court determined that none of these factors, in any way, negated the presence of the premature detention. Hence, under the exclusionary rule, the evidence obtained during the ensuing search (for heroin) should have been suppressed by the trial court.

The premise is clear from this scenario and has been echoed by courts with criminal jurisdiction throughout the nation: An officer acting unreasonably in failing to corroborate adequately an anonymous tip prior to effectuating a seizure has a means of recourse. Courts should be ready to recognize this recourse in light of the variety of situations confronting officers on the street and the seeming, albeit unwarranted, difficulty of understanding and applying the term "reasonable." However, allowing too much leeway will diminish this notion of "reasonableness" and increase too broadly the discretion afforded to our law enforcement personnel by allowing them to subjectively conduct themselves as they see fit. If discretionary activity were to become too broad, an anything-goes-so-long-as-done-in-good-faith type of philosophy would develop among

47 See id. at 427.
48 Id. at 433 (quoting United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978)).
49 Schneckloth, 412 U.S. at 227-28 (stating that Fourth and Fourteenth Amendments require that consent is freely and voluntarily given and is not the result of either implied or express duress or coercion).
50 Davis, 37 Va. App. at 434.
51 Id. at 436.
our nation’s law enforcement community. As the Terry Court adamantly stated, however, “simple ‘good faith on the part of the arresting officer is not enough’... [i]f good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers and effects,’ only in the discretion of the police.” 52 Had Detectives A and B merely refrained from approaching until after observing some furtive or suspicious movement on the part of Davis, or for that matter, just approached Davis without objectively detaining her, this entire situation would not have arisen. Acting reasonably obviously is not insinuating to an individual, based on nothing more than a bare-boned tip from an unnamed source, that he or she is in any way a suspect in criminal activity. As illustrated in this case, a police officer must act as an objectively reasonable law enforcement authority figure would in all situations, from his or her choice of words to the manner in which he or she formulates reasonable and articulable suspicion. Failure to do so frustrates justice by the invocation of the exclusionary rule and portrays our law enforcement personnel as being overzealous.

Scenario 2 was raised in Commonwealth v. Weeden. 53 The court, in this recent example of police officer failure to abide by the standard of reasonableness, had great trouble with the fact that, even though Officers C and D observed no suspicious conduct on the part of Weeden and his companion, the officers still seized their persons. “The officers did not see the defendants engage in any suspicious conduct. Nothing was remarkable about their appearance, and nothing suggested they were engaged in any criminal activity.” 54 What distinguishes this scenario from the first is that the tip provided to Officers C and D, indicating that Weeden and his companion were possibly carrying weapons, came from a known and reliable source, a fellow law enforcement officer. 55 However, this information alone suggested neither positive criminal activity nor even reasonable and articulable suspicion that criminal activity was in the process of taking place, was about to take place, or had taken place. Acting on the tip alone, therefore, was unreasonable. Officers C and D needed some form of independent corroboration beyond the physical description and location of the defendants. As their own observations provided them with nothing more than what they already knew, the detention and subsequent search and recovery of marijuana was tainted and so required the invocation of the exclusionary rule. 56

From this case, it can be determined that a mere hunch of criminal activity from an officer to a fellow officer does not increase the reliability of that hunch without some independent information gathered by the responding officers. In other words, it is not reasonable for an officer to rely fully on nothing more than a fellow officer’s speculation. 57 This is a situation in which the “sliding scale” approach to determine the

52 Terry, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).
54 Id. at *2.
55 Id. at *1.
56 Id. at *3.
57 But cf. United States v. Hensley, 469 U.S. 221, 232 (1985) (explaining that in some situations an investigative detention of an individual can be based on another police departments issuance of a flyer or
reliability of a tip can adequately be illustrated. While Officers C and D need to demonstrate less corroboration than if the tip came from an anonymous source, this leniency does not mean that they need no corroboration whatsoever. At no time will it suffice, unless the tip alone reaches the level of reasonable and articulable suspicion, to base an investigatory detention on the mere corroboration of someone's physical description and location.\(^{58}\) Just as in the first scenario, more patience on the part of the responding officers could very well have led to a much different and less frustrating result. It appears that what is a display of patience is reasonable, and what is reasonable requires patience. An officer should not be able to void the precious balancing of governmental interest in protecting society versus the right to personal security against governmental overreaching merely because he or she lacks the patience to find some indicia of reliability on the part of an informant's communication. If such behavior were to be allowed, there would be no balancing at all, but rather 100 percent discretion on the part of the officer.

The holdings laid down by the court in the first two scenarios heavily turn on the holding of the United States Supreme Court in Florida v. J.L.;\(^ {59}\) the case from which Scenario 3 was created. Again, the ultimate issue is based on the fact that the police were seeking to act upon insufficiently corroborated information contained in an anonymous tip. The United States Supreme Court correctly affirmed the Florida Supreme Court's decision, stating that “[a]nonymous tips ... are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject’s ‘not easily predicted movements.’”\(^ {60}\) Officers E and F were acting on a tip that provided nothing more than an individual's physical description and location, along with an inference that this person was carrying a gun. No other information was provided to the officers. There was no independent corroboration, beyond the description and location, so as to test the tip's reliability. Because “[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information,” the tip lacked moderate indicia of reliability and so, did not provide Officers E and F with reasonable and articulable suspicion to conduct an investigative detention.\(^ {61}\) Therefore, the gun that was retrieved by Officer E when he reached into J.L.’s pocket was property subjected to the exclusionary rule.\(^ {62}\)
It appears that Officers E and F took the information they did have and stretched it too far. The officers should have realized that conducting an outright seizure was unreasonable without some further corroboration. Had the officers merely approached J.L. and engaged him in consensual conversation, they may have obtained the requisite information and saved the judiciary the trouble of, once again, illustrating just how easy it is for an officer to act unreasonably. If the officers had just taken the time to further corroborate, which could merely have been a matter of seconds or, at most minutes, this youthful offender may have been properly punished under the law. Instead, officer impatience demonstrated unreasonable action, by Fourth Amendment standards, which ultimately resulted in a slap in the face to the entire criminal justice system.

Overall, as a collective and a free society, we must take the above scenarios and place various individuals, as well as ourselves, in the position of the citizen whose right to privacy has been invaded. Only upon doing so will we understand just why it may be more beneficial than not to allow a defendant to avoid some aspects of a criminal trial, or in fact the criminal trial in its entirety, merely because the police officer blundered, so to speak. Scenario 1 opens up the possibility that the informant was someone from your place of employment who informed the police of your plans for the evening. Perhaps it was someone who despised you for one reason or another, or maybe it was someone playing a crude practical joke. The possibilities are endless, but the ultimate proposition remains true: When confronted with such varying possibilities and no hard information explicitly pointing to criminal activity, no citizen should bear the burden of being confronted with accusations of criminal behavior. Just because someone can identify another person’s plans and physical description to law enforcement personnel does not provide any reasonable level of suspicion that an allegation of wrongdoing is credible. If that were the case and every officer were allowed to proceed as Officer A and B did in this scenario, then the Fourth Amendment would have no meaning whatsoever, and Daniel Webster’s oft-quoted statements on the topic of constitutionally protected liberties would be cast away into the shadows of Nineteenth Century senseless dicta.

Scenario 2 is particularly troublesome, because Officers C and D find it necessary to act on a fellow officer's statement that an individual may have something heavy in his pocket. Not only is this highly speculative, but it is also open to subjective interpretation. What seems to be “heavy” to one person is not necessarily “heavy” to another. Further, the presence of “something heavy” in one’s pocket has yet to be made a criminal act in any of the jurisdictions here in the United States. It would make absolutely no sense to subject a person to seizure and search merely because they may or may not have “something heavy” in their pocket that may or may not be a weapon. Somewhere between the tip and the unreasonable police action, all logic and sensibility was lost. This heavy item could have been anything from a roll of coins to a chemotherapy pump. Again, the possibilities are endless, although indeed, the item could very well have been some sort of weapon. Yet, without any reasonable and objective determination of the behavior taking place, and without any objective consideration of what was actually transpiring before the officer’s own eyes, the right against unreasonable governmental intrusion was stomped on in favor of pursuing what was, at best, a hunch.
Scenario 3 puts forth the same possibilities as Scenario 1. Officers E and F could have been acting on information that was reported to them from anyone—an arch enemy, an enraged lover, or anyone else who knew that the individual was standing on the street corner wearing a plaid shirt. Further, since J.L. involved a minor, the tip could have been referencing one's own child, or grandchild, or the like. The use of this type of information is blatantly unreasonable, especially when any suspicions on the part of Officer E and F could have been supported or dispelled with just a slight more effort.

What do these cases, and the thousands similar to them, represent? What is the underlying message, and can the end result of exclusion of the incriminating evidence ever be changed? It seems that the ultimate message is that officers are not being patient enough in conducting their required affairs. While resources may be strained and manpower low, it is important that officers are trained to be patient. It is imperative that they be trained to act reasonably. It is mandatory that they understand the rules and the reasoning of the judiciary and know how to apply it in their everyday confrontations, diverse as they may be. Many would argue, however, that it is absolutely infeasible to train our law enforcement personnel to undertake such legal interpretation so as to be able to distinguish between reasonable and unreasonable behavior. After all, with an average of four years of undergraduate study and three years of law school, many attorneys have a difficult time with the topic of search and seizure and will never have a mastery of the subject area. However, our adversarial legal system understands this, and the United States Supreme Court has provided for certain safeguards and recognitions:

It is apparent that in order to satisfy the “reasonableness” requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable. ... “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”63

Regardless of this understanding that reasonable officers make mistakes, and that some mistakes should not frustrate the ultimate ends of justice, the exclusionary rule seems to make the inevitable recommendation that officers become better trained by their superiors in the area of behavior that may have constitutional significance. By no means is it beyond the realm of possibilities that those persons choosing to protect and serve our country and its inhabitants, as law enforcement officers, can learn what is and what is not deemed “reasonable.” While situations may be ambiguous and decisions relating to those situations must be made in a matter of seconds, a well-trained officer must be able to

recognize immediately what is and what is not reasonable in accord with his or her fellow 
oficers. This can only be achieved through the continued use of the enduring 
exclusionary rule.

A Mind Towards More Effective Police Training: The Exclusionary Rule as a Guiding 
Light, Not as an Outdated Relic of Search and Seizure Law Past

The exclusionary rule of evidence was put into force by the judiciary so as to 
prevent federal and state courts from using evidence against a defendant that was 
obtained in violation of the defendant’s constitutional rights. Over the years, the 
Supreme Court of the United States has endorsed the view that the purpose of the 
exclusionary rule “is to deter—to compel respect for the constitutional guaranty [against 
unreasonable searches] in the only effectively available way—by removing the incentive 
to disregard it.” Without the rule that evidence tainted by an unreasonable search and 
seizure is inadmissible, the Fourth Amendment would be reduced to an “empty 
promise.” Police action resulting in unreasonable searches and seizures would go 
unrecognized and no recourse would be provided to the citizen whose privacy rights were 
invaded and flouted in the face of anything from blatant overreaching to slightly ill-
conceived, albeit objectively invalid, conduct.

Constitutional scholars and academics alike often argue that the exclusionary rule 
has become outdated in light of social developments and crime statistics of the current 
era. It has been inferred that both the integrity and fairness of judicial proceedings are 
threatened when evidence is excluded that would otherwise be necessary to the issuance 
of a true verdict. Further argued is the notion that the exclusionary rule provides an 
unfair “windfall” on those persons accused of committing criminal acts:

Our society...cherishes the notion that cheaters—or murderers, or rapists, 
for that matter—should not prosper. When the murderer’s bloody knife is 
introduced, it is not only the government that profits; the people also profit 
when those who truly do commit crimes...are duly convicted on the basis 
of reliable evidence. When rapists, burglars, and murderers are convicted,

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64 See Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to violations of the Constitution 
committed by state officials); Weeks v. United States, 232 U.S. 383 (1914) (applying the exclusionary rule 
to violations of the Constitution committed by federal officials).
65 Elkins v. United States, 364 U.S. 206, 217 (1960); see also United States v. Calandra, 414 U.S. 338, 347 
(1974) (“[T]he rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the 
guarantee of the Fourth Amendment against unreasonable searches and seizures.”); United States v. Leon, 
66 Mapp, 367 U.S. at 660.
Weis, Circuit Judge on the United States Court of Appeals for the Third Circuit and Chairman of the 
Federal Courts Study Committee, argued that such “suppositions...have never been established by the 
empirical data.” Id.
69 Michael T. Kafka, *The Exclusionary Rule: An Alternative Perspective*, 27 WM. MITCHELL L. REV. 1895, 
are not the people often more “secure in their persons, houses, papers, and effects?”

With these inherently “crime-control” methods of thought in mind, it has been urged that the exclusionary rule be abandoned and cast aside in favor of techniques that will allow the unreasonably and unlawfully seized information to remain as evidence in whatever case may happen to be at bar. The alternative to the exclusionary rule most frequently brought to the forefront is the use of civil trials dealing in tort against the officer(s) alleged to have violated the guidelines of the Fourth Amendment in obtaining otherwise reliable and trustworthy evidence. In other words, the proponents of civil liability compensation for those individuals whose Fourth Amendment rights have been unreasonably intruded upon, both criminals and non-criminals, would allow the evidence retrieved from their person or property to be introduced during a criminal trial against them. If the individual were to succeed in the civil proceeding against the officer, monetary compensation from the officer would be forthcoming to the individual. Such proceedings should not be afforded by our system of tort law, as it would be neither an effective deterrent to police officer abuse of discretion, nor would it provide the relief that the victim of police abuse of discretion should be entitled to.

Why is this form of civil compensation ill-advised? Many reasons immediately come to mind. Primarily, the problem arises as to what source the funds would be provided from if compensation is awarded. With the modest salaries provided to members of the law enforcement community, it would not be uncommon to find that the officers would be judgment-proof in such actions at law. The proponents lay claim to the notion that police departments, in cases of judgment-proof officers, would be responsible for the payment of compensation. This raises the issue of vicarious liability and governmental immunity, subjects worthy of separate research in and of themselves. Particularly, should a police department be liable for all of the actions of their officers (i.e. both good faith and bad faith violations of the Constitution), it seems that it would be unfair to hold an employer liable for the activities of its employees if such activities were committed (1) as a part of the discretionary duties of the employee; and (2) with malice and in a willful or wanton manner. Therefore, it would immediately appear that a potentially large segment of the population subjected to officer abuse of police power to search and seize would be left out of the loop of police department indemnification/vicarious liability.

Further, in addressing the monetary portion of civil proceedings against officers and departments, we must ask: What level of monetary value can be attached to a breach of one of the country’s longest standing and most important constitutional protections? The proponents of this system of tort liability claim that a sliding scale should be implemented by both the judiciary and the legislature with regard to the amount of

70 Amar, supra note 68, at 793.
71 Kafka, supra note 69 at 1934 (“History clearly demonstrates that the Fourth Amendment was drafted so as to provide for the award of monetary damages in those situations where overzealous government officials violated its commands.”); Amar, supra note 68 at 777.
It is contended that the scale should be based on the severity of the constitutional violation. Not only does this trample on the notion of separation of powers (that is, it is the duty of the legislature to craft the laws and the judiciary to interpret and apply those laws), but it also begs these important questions: Is one constitutional violation of the right to be left free from unreasonable searches and seizures by agents of state and federal government more valuable than another? Should the person convicted of a criminal violation based on unconstitutionally seized evidence receive less compensation because he was convicted? How will punitive damages be considered? What will be the tax implications on citizens who have nothing to do with either of the parties involved? Finally, would it be fair to have a wholly removed tax-paying citizenry largely face the responsibility of reimbursing convicted criminals for violations of the Constitution that ultimately led to their convictions? These few questions alone illustrate that there is far too much ambiguity and contradiction in such a system of civil liability.

A second issue that such a system would raise involves jury trials. In many of these constitutional violation civil actions, the system would have a convicted criminal as the plaintiff and a law enforcement officer as the defendant. Logical connections in the mind of an average juror are quite obvious. Even if one assumes that the defendant in the civil proceeding (the law enforcement officer) was barred from introducing evidence of the plaintiff’s criminal conduct, it would not be beyond the realm of juror mentality to take into consideration, in warranted cases, that the plaintiff, during court recess, is escorted by a bailiff to a holding cell for criminals. In other words, regardless of the rules of evidence utilized in such a civil proceeding, there may be circumstances where it is quite obvious that the plaintiff was found guilty of the crime related to the unconstitutionally-seized evidence. No matter the caliber of instructions provided to the jury at the direction of the court, that factor would not be erased from the minds of the jurors. Such a rule would have no more of an effect on a panel of jurors than the instruction to “disregard the testimony you just heard.” Once the fact is in the open, virtually nothing can be done to remove it. This is notwithstanding the fact that the jury would be faced with issues such as: “Did the defendant-police officer commit a violation of the Fourth Amendment by seizing the one and a half pounds of marijuana from the person of the defendant?” Or, “was there a Fourth Amendment violation where the defendant-officer seized a sawed-off shotgun from the defendant where the officer was merely acting on an anonymous tip?” Such questions seem to place stigma onto the plaintiff. Is the defendant, turned victim-plaintiff, afforded a fair civil hearing? Only in the eyes of staunch crime control activists would the question be answered in the affirmative.

Finally, the level of proof that must be shown by the plaintiff in a civil proceeding against the law enforcement officer must be considered. What would need to be shown in order to support the cause of action? What would be the basis of finding a Fourth Amendment violation so as to invoke upon the defendant-officer civil liability? What would be an unreasonable search and seizure in the realm of a civil trial? It has been

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72 Kafka, supra note 69, at 1937-38.
73 Id.
argued by the supporters of this proposal that the reasonableness of officer conduct should not be considered in such a proceeding. This is illogical considering the entire force and effect of Fourth Amendment constitutional law centers on the fact that the amendment is designed to protect solely against unreasonable searches and seizures. It would be virtually impossible to determine whether an unreasonable search and seizure occurred without the judiciary being able to delve into the issue of whether or not the officer acted objectively reasonable. Officer reasonableness, as demonstrated by the Court time and again, is one of the main elements of search and seizure law. It seems to be that the proponents of civil liability relating to officer conduct would turn on the ultimate question: “Is there proof, by a preponderance of the evidence, that Officer X subjectively violated the constitutional protections afforded to the plaintiff by the Fourth Amendment?” In answering this question, it would be necessary, as reasonableness would not be considered, that the jury base its decision on some legislatively-crafted set of circumstances that determine when, where, how, and under what precise conditions an officer encroaches on a citizen’s right to be free from unreasonable searches and seizures.

As discussed earlier in this paper, such a legislative document is more than impossible to produce and the courts have rightfully refused to take on the task. The situations are too numerous and the factual patterns too varied, based on the many situations that officers are confronted with daily, to create such a guideline. There is no escaping the notion that some analysis of reasonable behavior is unavoidable in applying search and seizure law in any form, be it criminal or civil.

Despite the arguments for and against the use of the exclusionary rule as a means of protecting privacy interests, the rule, in addition to its current applicability, potentially provides a greater use in the realm of police officer education and training on Fourth Amendment issues. While it may be true that there is an insubstantial amount of empirical evidence that illustrates that the exclusionary rule has a significant deterrent effect on police officer conduct, that is not to say that the rule cannot have this sought-after effect through the proper implementation of all of the potential uses of the rule. It is not a matter of revamping the nearly half-century use of the rule by the judiciary, but rather, a matter of using the rule as a more effective means of police officer training and education. If the rule were to be used more effectively as a training tool in the law enforcement community, the steadfast crime control activists would realize that most officers are breaching the Fourth Amendment, albeit not with the intention to do so, but rather because of a misunderstanding of the current scope of constitutional law. The rule has within it all that is necessary to provide officers with a better understanding of what is required of them. Hence, it is the proper mode of education that needs to be reconstructed, not the rule itself. It is apparent that this conclusion could be more readily

74 Kafka, supra note 69, at 1937 (“[I]n order to avoid a watering down of the statute’s effectiveness, the tribunal should consider neither the reasonableness of the law enforcement official’s conduct, nor the defendant’s bad reputation.”). See generally Wolf v. Colorado, 338 U.S. 25, 43 (1949) (Murphy, J. dissenting) (claiming that exclusion of illegally-obtained evidence is the only way to deter unconstitutional behavior, although articulating that factors such as reasonableness of police officer action would limit recovery of a plaintiff’s claim against an officer for violating the Fourth Amendment, should such a system ever be used).
understood were those in support of disregarding the exclusionary rule to step back and take a broader look at the rule’s total application.

All too often, those in support of alternatives to the rule make statements regarding the application of the rule such as: “exclusion demonstrates to law abiding individuals that the judicial system allows the guilty to simply go free;” “criminals like murderers and rapists go free...;” “law enforcement officers are put on trial instead of the guilty defendant;” and “the entire system of justice lets down the people it seeks to protect by letting the guilty walk.” It seems that the entire scope of the criminal justice system, an adversarial system of fairness to our citizens in general, is blinded by these ill-founded assertions and misstatements. It is easy to lose sight of the deterrent purpose of the exclusionary rule when one, from the very outset, sees the defendant on trial as a guilty criminal. It must never be forgotten that one is to be regarded innocent until proven guilty. That has been the foundation behind our form of government from its very inception and the principle upon which our judiciary is based.

Our criminal justice system operates so as to ensure that it is the prosecution who proves the elements of a crime necessary for a conviction. The prosecution must prove its case, and it must do so on the basis of evidence that is lawfully seized. When the exclusionary rule kicks in, and the state is essentially prevented from moving further on the matter, it is not a guilty person going free; rather, it is a presumably innocent person that escapes judicial inquiry. In today’s modern world, it is essential that we do not fuse together the terms “criminal” and “defendant.” The former does not necessarily characterize the latter until the judicial proceedings have concluded and the state has demonstrated to the judiciary, through legally-obtained evidence and information, that the individual standing trial committed the crime at issue beyond a reasonable doubt. When the effect of the rule is misconstrued, as many proponents of alternatives to the exclusionary rule often do by proposing that the criminal is going free, it becomes apparent that society as a whole is harmed. However, if we view the rule as protecting the innocent, as we are all presumed to be up until the point of a guilty verdict, we see that the rule protects and shelters all of society, and does not merely provide a windfall to a select few. The rule supports the idea that all citizens are safeguarded, because at no time will a law enforcement officer be able to put himself/herself above the demands of the Constitution.

The United States Supreme Court, in United States v. Leon,75 while discussing the parameters of reasonable good faith police conduct—which does not require the use of the exclusionary rule—stated: “[T]he key to the [exclusionary] rule's effectiveness as a deterrent lies ... in the impetus it has provided to police training programs that make officers aware of the limits imposed by the [F]ourth [A]mendment and emphasize the need to operate within those limits.”76 The same still holds true to this very day. In fact,

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76 Id. at 919, n.20 (quoting Jerold Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 MICH.L.REV. 1319, 1412-1413 (1976-77))(alterations in original). Professor Jerold Israel is currently an Ed Rood Eminent Scholar in Trial Advocacy and Procedure, Professor at the University of Florida, Levin College of Law.
even though the exclusionary rule is applied to only a minute percentage of all arrests, searches, and seizures made in the course of regular law enforcement activity, many persons, including those police officials responsible for adequately training their force and the American Bar Association, claim that the elements of the exclusionary rule result in increased police training on Fourth Amendment issues. That increased training should, and indeed has, “promoted professionalism in police departments across this country.”

As an educational tool, the exclusionary rule and the cases that demonstrate its applicability must not lay dormant in the bound volumes of legal reporters. Instead, it is pertinent that those police personnel and others in charge of training the members of all federal and state law enforcement agencies utilize the cases and comments in their training exercises. This form of constitutional law, search and seizure, and the notions and ideas accompanying the area are conceptually fluid. This is a result of the fact that there is not, and never will be, a legislatively or judicially-created categorical listing of actions that are and are not constitutionally permissible. As such, it becomes important that officers learn to understand the rules and procedures laid down by the courts having power over their jurisdiction. Therefore, “police training schools and police legal advisors must relay the message of the Court in meaningful terms to police officer[s], with the use of appropriate examples of what is and what is not reasonable action in stop and frisk situations” and all search and seizure circumstances for that matter.

As some critics attempt to claim, it is not impossible to teach law enforcement recruits the implications of the exclusionary rule. Through the use of real life events and constant continuing education as to the issues resolved by the courts, those charged with the duty to protect lawful citizens will come to an understanding of how to act reasonably in the face of possible exclusion of the evidence they obtain. A recent study conducted by Corey F. Hirokawa in conjunction with the Atlanta, Georgia, Police Department concluded similarly in stating that “to the extent police departments are concerned about the possible exclusion of evidence, the data collected ... shows that the police departments are well able to minimize the possibility of exclusion through careful construction of workable standards for their recruits to follow.” Obviously, merely informing police officers that they need to conduct themselves reasonably does not suffice and would, by itself, constitute negligent police training.

It appears that what officers need are well-delineated rules of conduct. Rules that go further than merely stating that an officer needs to act as a reasonable officer in his or her position would act if confronted with the circumstances in which they find themselves are needed. Rules that encompass the mindset of the court when it renders a decision to exclude evidence from a criminal trial would be extremely beneficial. All of

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78 Id.
80 J.D., Emory University, Atlanta, Georgia, 2000.
this should be formulated in terms that any officer, be it rookie or veteran, can understand and apply daily. These terms should and most definitely can, be constructed in ideas of what is and what is not reasonable in light of an objective interpretation. In other words, those persons responsible for training law enforcement personnel should provide some hard and fast general rules that can be taken from court decisions (i.e. it is an unreasonable search and seizure to detain a person based on nothing more than an uncorroborated anonymous tip that the particular person is at a particular location). As situations become more complex, an infusion of what is and what is not reasonable police practice needs to be drawn into the analysis and educational material. Only with hard and fast examples, as created by the courts, will officers grasp the concept of reasonable behavior that will not implicate the exclusionary rule. This, in conjunction with the Court’s awareness that officers make mistakes and that reasonable mistakes will not invoke the exclusionary rule, provides trainers/educators the leeway needed to portray an accurate depiction of how officers are supposed to act. Further, in providing recruits with real-life examples of what is and is not reasonable behavior in the eyes of the court, police departments may find that a pattern of rules emerge from their training. That is to say that it is not beyond the realm of common sense and judicial interpretation of constitutional law for a police department, in adapting the daily decisions of the judiciary to its training exercises, to develop rules specific to its particular needs and easier for police personnel to abide by. If these police department-specific rules further the demands of the Fourth Amendment in a manner that is stricter than the broad rules laid down by the judiciary, the department will be faced with fewer situations in which evidence may be excluded from trial.

The United States Supreme Court, in applying notions of “reasonable and articulable suspicion” and “probable cause” in the realm of “reasonable” and “common sense” actions on the part of our law enforcement officers, sets the stage for increased and more effective police officer training, rather than a deterioration of criminal procedure through the exclusionary rule. The Court has provided the world of law enforcement with the much needed slack that police departments need in creating sensible, community based and effective techniques for solving crime and keeping the majority of the community safe from criminal activity. Tossing illegally seized evidence out of the windows of the courthouse, whether it be because of an uncorroborated anonymous tip or an officer’s own observations which he or she believes equates to reasonable suspicion, has led and should lead all law enforcement agencies across the nation to invoke certain guidelines that restrict officer conduct more so than the term “reasonable,” by itself, implies, while at the same time demonstrating that the reason that the rule is in force is because a reasonable and objective officer would only act in that manner in his particular community.
Conclusion: A Poisonous Tree Is the Same By Any Other Name

The courts of recent year have been correct in maintaining the status quo of state and federal criminal procedure in regards to the rights to be afforded defendants in criminal cases. Evidence that is unreasonably obtained is not allowed to be used in the trial of a defendant. That which a reasonable officer in the position of the officer at issue would have done will result in including the evidence gained. Any judicial holding to the contrary would limit the ability of the exclusionary rule to protect all of society and secure both ordered liberty and due process of law. The broad, yet powerful, language of the Court casts a wide net of constitutional preservation on all of our citizens, not just the defendant who is innocent until proven guilty. Defeating the demands and effects of the rule, by initiating a system of Fourth Amendment tort liability, would lead to a decrease in officer training, not the increase that should be occurring during the Twenty-First Century. As the judicial branch upholds this status quo that it has reached, it will become evident that law enforcement agencies, in training their officers as to how to apply the law of search and seizure, will be able to take the particularities of their jurisdiction into consideration more so than in the past in illustrating why one confrontation between a citizen and police officer is unreasonable while another is not.

As Scenarios 1, 2, and 3 come up in the area in which you reside, ask yourself whether Officers A through F would have conducted themselves in the same manner regarding the information contained in the tip that was at issue had the exclusionary rule not been applicable. It is evident that no alternative would have prevented the officers from acting the way they did, especially some remedy that potentially would have only hit the purse of the department for which they work. As the Court upholds a test of reasonableness, more and more jurisdictions will come to understand just what types of training activities will benefit their respective locations.

The scenarios illustrated in this paper and the respective holdings of the courts in which they arose demonstrate only a sampling of police conduct deemed to be unreasonable. This sampling, however, is representative across the United States and illustrates the dire need for continued and refocused education in the local precincts and station houses. Chiefs of police, prosecutors, and community legal advisors should take a more hands on and proactive role, than has historically been the case, in teaching, re-teaching, and portraying to their officers what is and is not a proper and reasonable search and seizure.

As search and seizure law continues to be refined by the employment of various police agency training techniques, we must keep the following in mind: A farmer has but one use for the fruits of a poisonous tree—using those fruits to educate himself as to more adequate methods of growth. Likewise, police departments and the judiciary have but one use for the fruits of an illegal search and seizure—research and development of better means of protecting society from governmental overreaching through a continuous form of self-education. Once the fruit is utilized for each of these educational purposes…it shall be tossed aside, never to be seen or heard from again.