Conclude to Exclude: The Exclusionary Rule's Role in Civil Forfeiture Proceedings

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CONCLUDE TO EXCLUDE: THE EXCLUSIONARY RULE’S ROLE IN CIVIL FORFEITURE PROCEEDINGS

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INTRODUCTION

Suppose that while you are travelling under suspicious circumstances, the police stop and question you. Because you were not expecting this, you exhibit a nervous demeanor that provides the officers with reasonable suspicion, and they detain your luggage. The officers do not have probable cause to search your bag, but they do so anyway, only to discover that you are carrying $100,000 in cash. Although the search clearly violates the Fourth Amendment, certain jurisdictions would permit the government to initiate a forfeiture proceeding on the illegally seized currency. Some of these jurisdictions, however, would not permit you to use the exclusionary rule in this civil forfeiture proceeding.

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The Framers’ purpose in drafting the Fourth Amendment was to provide American citizens with an indefeasible right against unreasonable search or seizure. The judicially created exclusionary rule seeks to protect that right by excluding from trial any evidence obtained through an unconstitutional search or seizure. Typically, the exclusionary rule applies only in criminal trials.

However, the United States Supreme Court has held that, in determining whether to invoke the exclusionary rule outside of the criminal trial context, courts must balance the benefits of deterrence against the costs to society. Under the Supreme Court’s approach, the benefits of deterrence may be low if the officers conducted the search for criminal prosecution purposes. In that situation the exclusion of evidence in a civil proceeding would be unlikely to provide significant additional deterrence, since application of the exclusionary rule in the criminal trial has already served to deter the officers from committing future Fourth Amendment violations. Moreover, the cost to society of excluding probative evidence is relatively high. As a result of these relative costs and benefits, certain jurisdictions have declined to apply the exclusionary rule to civil forfeiture proceedings. Courts’ refusal to apply the exclusionary rule outside the criminal trial context appears to weaken the fundamental right against unreasonable search and seizure.

This Note will examine the evolution of the exclusionary rule and its application to proceedings outside of the criminal trial context.

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5 Mapp, 367 U.S. at 655.
7 See id.
9 See, e.g., $241,600 U.S. Currency, 67 Cal. App. 4th at 1113.
First, the Note will focus on the Supreme Court’s development of the exclusionary rule as a sanction used in criminal trials to deter law enforcement officers from violating citizens’ Fourth Amendment rights.\textsuperscript{11} Second, the Note will examine the Supreme Court’s application of the exclusionary rule to quasi-criminal forfeiture proceedings in \textit{One 1958 Plymouth Sedan v. Pennsylvania}.\textsuperscript{12} Third, the Note will examine the Supreme Court’s reluctance to extend the exclusionary rule beyond the criminal trial context, focusing on the cost-benefit analysis test applied by the Court.\textsuperscript{13} Fourth, the Note will examine the confusion that has developed in state and lower federal courts with respect to \textit{Plymouth}\textsuperscript{14} and the subsequent cases in which the Court applied the cost-benefit analysis and failed to invoke the exclusionary rule outside of the criminal trial context.\textsuperscript{15} Fifth, the Note will examine \textit{United States v. Marrocco},\textsuperscript{16} a recent Seventh Circuit case that contained a pertinent concurring opinion by Judge Easterbrook relating to the application of the exclusionary rule in civil forfeiture proceedings.\textsuperscript{17} Finally, the Note will investigate the questioned validity of the \textit{Plymouth} holding and its impact on modern forfeiture proceedings. Because the viability of \textit{Plymouth} is in question, the Court’s cost-benefit analysis could determine whether to invoke the exclusionary rule in the context of civil forfeiture. While

\textsuperscript{11} See \textit{Weeks}, 232 U.S. at 398.
\textsuperscript{12} See \textit{380 U.S.} 693, 696 (1965).
\textsuperscript{13} See \textit{Calandra}, 414 U.S. at 349.
\textsuperscript{14} See United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1063 (9th Cir. 1994) \textit{superseded in part by statute}, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202. (holding that the Fourth Amendment exclusionary rule is applied to forfeiture actions based on the precedent established in \textit{Plymouth}); People v. $241,600 U.S. Currency, 67 Cal. App. 4th 1100, 1113 (Cal. Ct. App. 1998) (distinguishing the \textit{Plymouth} precedent and holding that the Fourth Amendment exclusionary rule does not apply to civil forfeiture proceedings using the Court’s cost-benefit analysis).
\textsuperscript{15} See \textit{Scott}, 524 U.S. at 369; \textit{Lopez-Mendoza}, 468 U.S. at 1050; \textit{Janis}, 428 U.S. at 460; \textit{Calandra}, 414 U.S. at 354.
\textsuperscript{16} 578 F.3d 627, 630 (7th Cir. 2009).
\textsuperscript{17} \textit{Id.} at 642 (Easterbrook, J., concurring).
the cost-benefit test has never applied the exclusionary rule beyond the criminal trial context, the changing objectives of law enforcement officers, and the changing statutory structure of civil forfeiture statutes, suggests that the cost-benefit analysis should weigh in favor of applying the exclusionary rule in civil forfeiture proceedings.

I. FRAMING THE ISSUE: THE EVOLUTION OF THE EXCLUSIONARY RULE IN CRIMINAL PROCEEDINGS

The Fourth Amendment to the United States Constitution provides:

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.\textsuperscript{18}

The premise underlying the Framers’ drafting of the Fourth Amendment was that American citizens have indefeasible rights to personal security, personal liberty, and private property, which may only be restricted after the state has probable cause to suspect that a citizen has committed a crime.\textsuperscript{19} For years, however, the Court searched for a remedy for American citizens who were subjected to unreasonable searches or seizures.\textsuperscript{20} In 1914, the Supreme Court developed the judicial remedy known as the exclusionary rule to better safeguard Americans’ Fourth Amendment rights.\textsuperscript{21} In \textit{Weeks v. United States}, a United States Marshal entered Fremont Weeks’s home

\textsuperscript{18} U.S. CONST. amend. IV.
without a warrant and seized books, letters, money, papers, and notes, along with other property.\textsuperscript{22} Weeks petitioned the court for the return of his property, contending that the warrantless search of his home violated the Fourth Amendment.\textsuperscript{23} The district court denied Weeks’s petition and admitted the illegally seized property into evidence.\textsuperscript{24} Weeks appealed, and the Supreme Court granted certiorari.\textsuperscript{25} On appeal, the Supreme Court concluded:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.\textsuperscript{26}

While “the efforts of the courts and their officials to bring the guilty to punishment [was] praiseworthy,” such efforts “are not to be aided by the sacrifice of those great principles established b[y] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”\textsuperscript{27} The Court also referenced its decision in \textit{Adams v. New York}, stating that “the [Fourth] Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law.”\textsuperscript{28} By admitting illegally seized property into evidence, the Court “would . . . affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against . . . unauthorized action.”\textsuperscript{29} Because

\begin{itemize}
  \item \textsuperscript{22} \textit{Id.} at 387.
  \item \textsuperscript{23} \textit{Id.} at 388.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.} at 389.
  \item \textsuperscript{26} \textit{Id.} at 393.
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} \textit{Id.} at 394 (citing \textit{Adams v. New York}, 192 U.S. 585, 598 (1904)).
  \item \textsuperscript{29} \textit{Id.}
\end{itemize}
Although the Supreme Court developed the exclusionary rule in *Weeks* to serve as a judicial safeguard of citizens’ Fourth Amendment rights, there was a limitation—the exclusionary rule was only applicable against the federal government and its agencies.31

In 1961, the Supreme Court overturned *Weeks* in part, when it held in *Mapp v. Ohio* that the exclusionary rule also applied to state criminal trials.32 The Court concluded that, because the Fourth Amendment’s right of privacy applied to the states through the Due Process Clause of the Fourteenth Amendment, the same sanction of exclusion used against the Federal Government also should apply to the states.33 The Court stated that “[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”34 The Court has never hesitated to enforce against the states the rights of freedom of speech and the press or the right to not be convicted by use of a coerced confession; why then would it hesitate to apply the right to be protected against unconstitutional search and seizure?35 Should the Court allow the state to admit evidence that was unlawfully seized, it would in effect encourage disobedience of the Federal Constitution, which states are bound to uphold.36 Thus, the Supreme Court expanded the exclusionary rule to apply to both state and federal criminal prosecutions.37

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30 Id. at 398.
31 Id.
33 Id. at 655.
34 Id. at 660.
35 Id. at 656.
36 Id. at 657.
37 Id. at 660; see also Weeks v. United States, 232 U.S. 383, 398 (1914).
II. THE EXCLUSIONARY RULE APPLIED TO QUASI-CRIMINAL FORFEITURE PROCEEDINGS

Following its decision in *Weeks*, the Court had never applied the exclusionary rule outside the criminal trial context.\(^{38}\) In *Plymouth*, the Supreme Court granted certiorari to determine whether the exclusionary rule enunciated in *Weeks*\(^{39}\) and extended to the states in *Mapp*\(^{40}\) was applicable to civil forfeiture proceedings.\(^{41}\) In *Plymouth*, two law enforcement officers observed that a car was weighed down in the rear, and subsequently pulled over the vehicle.\(^{42}\) The officers identified themselves, questioned the owner, George McGonigle, and searched the car, which revealed thirty-one cases of liquor that failed to bear Pennsylvania tax seals.\(^{43}\) The officers seized the liquor and car and arrested McGonigle; however, the officers did not have a search or arrest warrant.\(^{44}\) Pennsylvania filed for forfeiture of the automobile pursuant to state statute.\(^{45}\) At the hearing, McGonigle sought dismissal of the forfeiture petition on the ground that the forfeiture of the vehicle depended on admission of evidence obtained in violation of the Fourth Amendment.\(^{46}\) The Pennsylvania trial court dismissed the forfeiture petition.\(^{47}\)

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\(^{38}\) *See Weeks*, 232 U.S. at 398.

\(^{39}\) *See id.*

\(^{40}\) *See 367 U.S. at 660.


\(^{42}\) *Id.* at 694.

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.*; see 47 PA. STAT. ANN. § 6-601 (West 1964) (“No property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may . . . be instituted . . .”).

\(^{46}\) *Plymouth*, 380 U.S. at 694–95.

\(^{47}\) *Id.* at 695.
On appeal, the intermediate appellate court reversed and directed that the automobile be forfeited. The Pennsylvania Supreme Court, affirming the order of the appellate court, concluded that “the exclusionary rule . . . applies only to criminal prosecutions and is not applicable in a forfeiture proceeding which the Pennsylvania court deemed civil in nature.”

The United States Supreme Court granted certiorari to determine whether the exclusionary rule applied to the forfeiture proceeding. Initially, the Court examined its decision in *Boyd v. United States*, which involved a forfeiture proceeding by the United States to forfeit thirty-five cases of plate glass due to the offender’s failure to pay a customs duty. The Court quoted the *Boyd* opinion, which stated “that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.” The Court in *Boyd* concluded that, because the statute required not only a fine or imprisonment for the failure to pay the customs duty, but also that such merchandise shall be forfeited, the proceeding was actually criminal in nature. Believing *Boyd* to be dispositive of the issue in *Plymouth*, the Court concluded that the exclusionary rule applied because the Pennsylvania forfeiture proceeding was “quasi-criminal” in nature, since the forfeiture of the vehicle was necessitated by a criminal conviction. While the Pennsylvania proceeding was technically a civil forfeiture proceeding, the Court concluded that in substance and effect, it was a criminal proceeding since the forfeiture statute that authorized the proceeding affixed penalties to criminal acts. Thus, “[i]t would be anomalous . . . to hold that in the criminal

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48 Id.
49 Id.
50 Id. at 696.
51 Id. at 696–98 (citing *Boyd v. United States*, 116 U.S. 616, 633–34 (1886)).
52 Id. at 697 (quoting *Boyd*, 116 U.S. at 634).
54 *Plymouth*, 380 U.S. at 700.
55 Id.
proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law ha[d] been violated, the same evidence would be admissible.”56 The Court held that the exclusionary rule applied to the quasi-criminal forfeiture proceeding.57

An important caveat, however, is that the Court’s decision was based on the character of the particular forfeiture proceeding at issue, and thus, a distinction may be made when a civil forfeiture proceeding is not necessitated by a criminal conviction.58

III. THE EVOLUTION OF THE SUPREME COURT’S COST-BENEFIT ANALYSIS TEST AND ITS IMPACT ON THE EXTENSION OF THE EXCLUSIONARY RULE BEYOND CRIMINAL PROCEEDINGS

The primary purpose behind the judicially created exclusionary rule is to safeguard American citizens’ Fourth Amendment rights through deterrence of future unlawful police conduct.59 Since Plymouth, the Supreme Court has refused, in a number of cases, to extend the exclusionary rule beyond the criminal trial context.60 The cost-benefit analysis utilized by the Supreme Court has never applied the exclusionary rule outside the context of criminal prosecution because the substantial costs to society of excluding concededly relevant evidence has always outweighed the deterrence benefits achieved through application of the rule.61

56 Id. at 701.
57 Id. at 702.
58 See id. at 696.
61 See id. at 448.
A. The Court’s Cost-Benefit Analysis Applied to Grand Jury Proceedings

Following its decision in Plymouth, the Court developed a cost-benefit analysis test in order to determine whether the application of the exclusionary rule in situations outside the criminal trial context would achieve the rule’s intended purpose, deterrence.62 In United States v. Calandra, the Court examined whether a witness summoned to testify before a grand jury could answer questions based on evidence obtained from an unlawful search and seizure.63 Federal agents obtained a search warrant, which authorized a search of John Calandra’s place of business in connection with suspected illegal gambling operations.64 The officers failed to uncover any gambling paraphernalia; however, the officers discovered a card that indicated that Calandra had received periodic payments from Dr. Walter Loveland.65 The officers, who were aware that the U.S. Attorney’s Office was investigating the possibility that Dr. Loveland had been a victim of loan-sharking, seized the letter along with various other items, which included books and records of the company.66 Following the seizure, the state of Ohio convened a special grand jury to investigate the potential loan-sharking activities, which were a violation of federal law.67 The grand jury subpoenaed Calandra to determine whether the seized evidence related to loan-sharking.68 Calandra moved to suppress the evidence because the search exceeded the scope of the warrant.69 The United States District Court for the Northern District of Ohio granted Calandra’s motion to suppress and ruled that he need not answer any questions related to the seized evidence.

62 Calandra, 414 U.S. at 349.
63 Id. at 339.
64 Id. at 340.
65 Id.
66 Id. at 340–41.
67 Id. at 341.
68 Id.
69 Id.
The United States Court of Appeals for the Sixth Circuit, affirming the decision, held that “the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawful search and seizure.”

The Supreme Court granted certiorari. Initially, the Court stated that the purpose of the exclusionary rule “is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” In deciding whether to apply the exclusionary rule to grand jury proceedings, the Court “weigh[ed] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.” First, the Court determined that the application of the exclusionary rule would interfere with grand jury proceedings. “Suppression hearings would halt the orderly process of an investigation,” which would “frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”

Next, the Court concluded that the deterrence benefits of applying the exclusionary rule to grand jury proceedings would be fairly low. Extending the exclusionary rule to grand jury proceedings “would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation.” The Court stated that “[w]hatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to

\[70\] Id.
\[71\] Id. at 342.
\[72\] Id.
\[73\] Id. at 347.
\[74\] Id. at 349.
\[75\] Id.
\[76\] Id.
\[77\] Id. at 350.
\[78\] Id. at 351.
\[79\] Id.
grand jury proceedings would significantly further that goal.\textsuperscript{80} Applying the exclusionary rule to grand jury proceedings would provide a minimal advancement of deterrence of police misconduct because the officers are “consciously directed” toward discovering evidence admissible in criminal trials.\textsuperscript{81} Thus, the social costs to the grand jury proceeding “outweigh[ed] the benefit of any possible incremental deterrent effect” achieved through its application.\textsuperscript{82} As a result, the Court declined to extend the exclusionary rule to grand jury proceedings.\textsuperscript{83}

\textbf{B. The Court’s Cost-Benefit Analysis Applied to Civil Tax Proceedings}

Using the cost-benefit approach adopted in \textit{Calandra}, the Supreme Court also declined to extend the exclusionary rule to civil tax proceedings.\textsuperscript{84} In \textit{United States v. Janis}, the Court examined whether evidence illegally seized by a state criminal law enforcement official was admissible in a civil tax proceeding brought by the United States.\textsuperscript{85} The Los Angeles police had obtained a defective search warrant and, when executing the warrant, had uncovered evidence of Max Janis’s book-making activity, including cash.\textsuperscript{86} Based on the evidence recovered, the police contacted the Internal Revenue Service (IRS).\textsuperscript{87} The IRS determined that Max Janis had not filed a federal wagering tax return, which was required for book-making activities.\textsuperscript{88} Upon examination of the evidence, the IRS made an assessment

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 351–52.
\item \textsuperscript{82} \textit{Id.} at 354.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{United States v. Janis}, 428 U.S. 433, 460 (1976).
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at 436.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 437.
\end{itemize}
\end{footnotesize}
against Max Janis in excess of $89,026.00.\textsuperscript{89} Based on the assessment, the IRS brought a separate civil tax proceeding in federal district court, seeking to levy the cash that the police had seized.\textsuperscript{90} After Janis moved to suppress the evidence seized and to quash the assessment, the district court granted the motion because the evidence relied upon by the IRS was obtained through the defective search warrant and, thus, the assessment was based on illegally obtained evidence in violation of the Fourth Amendment.\textsuperscript{91}

On appeal, the Court first noted the deterrent sanction imposed by the exclusionary rule, which had already “punished” the Los Angeles police by barring use of the evidence in state criminal court.\textsuperscript{92} The Court also reasoned that the illegally obtained evidence would be inadmissible in federal criminal court, which meant that the “entire criminal enforcement process” had been frustrated.\textsuperscript{93} Since the federal civil tax proceeding fell outside the “zone of primary interest” of the Los Angeles police,\textsuperscript{94} the exclusion of the evidence in a federal civil proceeding was “unlikely to provide significant, much less substantial, additional deterrence” because the use of the exclusionary rule in the criminal trials had already deterred the Los Angeles police from conducting illegal searches.\textsuperscript{95}

Second, the Court noted the substantial cost imposed on society by excluding “what concededly is relevant evidence.”\textsuperscript{96} In declining to extend the exclusionary rule to civil tax proceedings, the Court concluded that the “additional marginal deterrence” gained by applying the exclusionary rule to the federal civil tax proceeding

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 439 (internal quotation marks omitted).
\textsuperscript{92} Id. at 448.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 458.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 449.
“surely does not outweigh the cost to society of extending the rule to that situation.”

C. The Court’s Cost-Benefit Analysis Applied to Civil Deportation Proceedings

Following Janis, the Supreme Court next declined to extend the exclusionary rule to civil deportation proceedings.\(^9\) In \textit{INS v. Lopez-Mendoza}, Immigration and Naturalization Service (INS) agents arrested Lopez-Mendoza at his place of work without securing either a search warrant to search the premises or an arrest warrant to place the occupants into custody.\(^9\) Following the arrest, the INS instituted deportation proceedings against Lopez-Mendoza.\(^9\) In a hearing held before an immigration judge, Lopez-Mendoza moved to terminate the deportation proceeding on grounds that his arrest had been illegal.\(^9\) The immigration judge concluded that Lopez-Mendoza was deportable because the legality of the arrest was irrelevant to the deportation proceeding.\(^9\) Lopez-Mendoza appealed, and “[t]he Court of Appeals vacated the order of deportation and remanded for a determination whether Lopez-Mendoza’s Fourth Amendment rights had been violated when he was arrested.”\(^9\)

On appeal, the Supreme Court applied the same cost-benefit analysis it had used in \textit{Janis}.\(^9\) Initially, the Court conceded that the exclusionary rule’s deterrence value would likely be higher here than in \textit{Janis} because the INS agents who arrested Lopez-Mendoza were the same agents who brought the deportation proceeding against

\(^9\) Id. at 453–54.
\(^9\) Id. at 1035.
\(^9\) Id. at 1036.
\(^9\) Id. at 1042; see also United States v. Janis, 428 U.S. 433, 453–54 (1976).
However, the Court pointed to three factors that reduced the exclusionary rule’s deterrence value in civil deportation proceedings. First, the Court noted that deportation was still possible regardless of whether the arrest was illegal, as deportation was supported by evidence that was derived independently from the arrest. Second, the Court pointed out that INS agents arrested almost 500 illegal aliens per year; however, over 97.5% agree to voluntary deportation without a formal hearing. Because of this, “the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.” Third, “the INS ha[d] its own comprehensive scheme for deterring Fourth Amendment violations by its officers.” The INS’s scheme included regulations that “require[d] that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof.” Additionally, new INS officers “receive[d] instruction and examination in Fourth Amendment law,” and the INS punished any immigration officer who committed a Fourth Amendment violation. The Court concluded that the “INS’s attention to Fourth Amendment interests [could] not guarantee that constitutional violations w[ould] not occur, but it d[id] reduce the likely deterrent value of the exclusionary rule.”

In weighing the costs, the Court concluded that the social costs of applying the exclusionary rule in the context of deportation proceedings would be very high, since the release from custody would immediately permit the illegal alien to continue his unlawful presence

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105 Lopez-Mendoza, 468 U.S. at 1042.
106 Id. at 1043–45.
107 Id. at 1043.
108 Id. at 1044.
109 Id.
110 Id.
111 Id. at 1045.
112 Id.
113 Id.
in the United States.\textsuperscript{114} In balancing the benefits of deterrence against the costs to society, the Court declined to apply the exclusionary rule in civil deportation hearings based on the high social costs of allowing an immigrant to remain illegally inside the United States.\textsuperscript{115}

D. The Court's Cost-Benefit Analysis Applied to Probation-Revocation Hearings

Following \textit{Lopez-Mendoza}, the Court next declined to apply the exclusionary rule to probation revocation hearings.\textsuperscript{116} In \textit{Pennsylvania Board of Probation and Parole v. Scott}, parole officers entered Scott's residence—which was his mother's home—without consent and seized five firearms, a compound bow, and three arrows.\textsuperscript{117} At the parole violation hearing, Scott challenged the introduction of the seized evidence as a violation of his Fourth Amendment rights.\textsuperscript{118} The Court concluded that the societal costs of excluding evidence “are particularly high in the context of parole revocation hearings”\textsuperscript{119} because “parolees . . . are more likely to commit future criminal offenses than are average citizens.”\textsuperscript{120} Moreover, the deterrence value of excluding evidence illegally seized by officers “unaware that the subject of [the] search is a parolee” would be marginal because the use of the exclusionary rule in criminal trials already deterred these officers from conducting illegal searches.\textsuperscript{121} In that situation, an officer would be searching for evidence admissible at a criminal trial and, thus, would be deterred from obtaining evidence in violation of the Fourth Amendment, which would be inadmissible at trial.\textsuperscript{122}

\textsuperscript{114} Id. at 1047.
\textsuperscript{115} Id. at 1050.
\textsuperscript{117} Id. at 360.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 365.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 367.
\textsuperscript{122} Id.
Additionally, the Court concluded, “even when the officer knows that the subject of his search is a parolee, the officer will be deterred from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials.”123 In balancing these interests, the Court declined to extend the exclusionary rule to parole violation hearings.124

As indicated by the above cases, the Supreme Court has taken dramatic steps from its initial decisions in Mapp, Weeks, and Plymouth. Following those decisions, the Court has consistently applied a balancing test—weighing the benefits of deterrence against the costs to society—in deciding whether to invoke the exclusionary rule.125 In examining the benefits of deterrence, the Court has focused on the fact that officers are generally deterred from conducting illegal searches based on the application of the exclusionary rule in criminal trials.126 Thus, if the Court found that the officer or agency that conducted the search was consciously directed towards criminal prosecution, then the Court would conclude that the application of the exclusionary rule would lead to only a marginal increase in deterrence.127 Moreover, the Court has focused heavily on the costs to society in both excluding probative evidence from subsequent proceedings and the exclusionary rule’s impact on the administrative proceeding.128 In balancing the costs and benefits, the Court’s undivided trend has been to decline application of the exclusionary rule outside the criminal trial context.129

123 Id. at 368.
124 Id. at 369.
126 Janis, 428 U.S. at 448.
127 See id. at 458.
129 See Scott, 524 U.S. at 369; Lopez-Mendoza, 468 U.S. at 1050; Janis, 428 U.S. at 460; Calandra, 414 U.S. at 354.
IV. THE DIVIDED DECISIONS IN THE LOWER FEDERAL AND STATE COURTS

The Supreme Court decisions since Mapp, which have consistently declined to extend the exclusionary rule beyond the criminal trial context, stand in stark contrast to the Court’s decision in Plymouth and have left state and lower federal courts questioning whether to apply the exclusionary rule in civil forfeiture proceedings. At the crux of this confusion is the Plymouth Court’s finding that civil forfeiture proceedings are “quasi-criminal” in nature because, like a criminal proceeding, the object is to penalize for the commission of an offense against the law.

Because the Supreme Court’s decision in Plymouth stands in stark contrast to its decisions in Janis, Lopez-Mendoza, and Scott, lower state and federal courts have been given two options to determine whether to apply the exclusionary rule to civil forfeiture proceedings: (1) follow the precedent established in Plymouth; or (2) distinguish Plymouth, treat the forfeiture as a civil proceeding, and weigh the benefit of deterrence against the cost to society. As a result, lower courts have continued to provide inconsistent rulings in deciding whether the exclusionary rule is applicable to civil forfeiture proceedings.

A. The Ninth Circuit and its Reaffirmation of Plymouth

The United States Court of Appeals for the Ninth Circuit is one of the lower courts that, following Plymouth, have held that the

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130 See Scott, 524 U.S. at 369; Lopez-Mendoza, 468 U.S. at 1050; Janis, 428 U.S. at 460; Calandra, 414 U.S. at 354.


exclusionary rule applies in civil forfeiture proceedings. For example, in United States v. $191,910 in U.S. Currency, officers became suspicious of Bruce Morgan after he placed his bags through an airport security x-ray machine, and when searched, the officers discovered the bags contained a large sum of money. The district court held that the search was illegal and granted Morgan’s motion for summary judgment. The Ninth Circuit affirmed the decision to apply the exclusionary rule to the civil forfeiture proceeding.

B. California State Court: The Cost-Benefit Analysis Applied to Civil Forfeiture Proceedings

In contrast with the Ninth Circuit, California is one state that, following Plymouth, has held that the exclusionary rule is not applicable to civil forfeiture proceedings. In People v. $241,600 in U.S. Currency, the California Court of Appeals distinguished its case from Plymouth, stating that, “unlike in Plymouth, the forfeiture action is an in rem civil proceeding which is not based on a provision requiring the claimant to be found guilty of a criminal offense nor imposing imprisonment as a penalty for a criminal act.” After concluding that the case was a purely civil action, the California court applied the Janis test to determine whether the deterrence value of applying the exclusionary rule to a civil forfeiture proceeding

133 See $191,910 in U.S. Currency, 16 F.3d at 1063. The Eleventh and Eighth Circuits have also held this way. United States v. $291,828.00 in U.S. Currency, 536 F.3d 1234, 1237 (11th Cir. 2008) (holding that the Fourth Amendment exclusionary rule applied to forfeiture actions); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993) (holding that because forfeiture proceedings are quasi-criminal in character, the exclusionary rule applies, barring evidence obtained in violation of the Fourth Amendment).

134 Id. at 1054.
135 Id. at 1056–57.
136 Id. at 1054.
138 Id. at 1111–12.
outweighed the societal costs. In concluding that the exclusionary rule did not apply to civil forfeiture proceedings, the court stated that “[t]he likelihood of achieving additional deterrence by excluding illegally seized evidence in a civil forfeiture proceeding is not sufficient to outweigh the societal costs imposed by the exclusion.” The court reinforced its decision by stating that “[t]o date the United States Supreme Court has rejected application of the exclusionary rule to civil cases, and we decline to do so as well in this civil forfeiture case.”

V. THE SEVENTH CIRCUIT AND THE EXCLUSIONARY RULE IN CIVIL FORFEITURE PROCEEDINGS

To date, the United States Court of Appeals for the Seventh Circuit has remained silent on whether the exclusionary rule would be applied in civil forfeiture proceedings; however, in a recent concurring opinion, Judge Easterbrook provided insight into how the court may decide the issue. In United States v. Marrocco, the Seventh Circuit was presented with a civil forfeiture case that developed following an illegal search of luggage. An officer for the Amtrak police had searched a computer database and discovered that Vincent Fallon had paid cash for a one-way ticket less than seventy-two hours before departure, which fit the profile of a drug courier. Upon observing Fallon enter his compartment, two officers approached and questioned him as to whether he was carrying any weapons, drugs, or large sums of money. During the officers’ questioning, Fallon exhibited a nervous demeanor, which provided the officers with reasonable

139 Id. at 1113.
140 Id. (citing United States v. Janis, 428 U.S. 433, 453–54 (1976)).
141 Id.
142 United States v. Marrocco, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, J., concurring).
143 Id. at 629.
144 Id.
145 Id.
suspicion to detain his luggage. While Fallon denied the officers’ request to search the luggage, he told them that the luggage contained $50,000. The officers brought the luggage to the Amtrak police office, used a pocketknife to open the luggage, and uncovered numerous bundles of money. Subsequent to the search, the officers summoned a canine unit to conduct a sniff of the briefcase. The canine unit alerted to the briefcase, which served as an indication that it contained drugs or money contaminated with drugs. The officers retained the briefcase and the funds, and the government subsequently filed a complaint in federal district court seeking forfeiture of the funds under the Controlled Substances Act. Prior to trial, Fallon filed a motion to suppress the seizure of the funds, and the district court granted his motion.

On appeal, the Seventh Circuit reversed the decision of the district court. The court held that, under the inevitable discovery doctrine, it was improper to suppress the funds. The court noted that it is proper to apply the inevitable discovery doctrine as long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means.” The court went on to state that, to satisfy its burden under the inevitable discovery doctrine, the government must first show that it would have obtained “an independent, legal justification for conducting a search that would have led to the discovery of the evidence.” Second, “the [g]overnment must demonstrate that it would have conducted a lawful

146 Id. at 630.
147 Id.
148 Id.
149 Id.
150 Id.
152 Marrocco, 578 F.3d at 630.
153 Id. at 642.
154 Id.
155 Id. at 637 (quoting Nix v. Williams, 467 U.S. 431, 444 (1984)).
156 Id. at 637–38.
search absent the challenged conduct." The court concluded that the officers met the first burden because the result of the dog-sniff test, which would have supported the issuance of a warrant, provided an independent legal justification for searching the briefcase. Because the officers already knew that the briefcase contained money, the court concluded that the "officers detained the briefcase in order to conduct an investigation that would establish a link between the funds and illegal activity." The officers also met the second requirement because the "investigating officers undoubtedly would have followed routine, established steps resulting in the issuance of a warrant." Based on the government’s satisfaction of the inevitable discovery doctrine, the Seventh Circuit overturned the district court’s ruling to suppress the illegally seized funds and remanded the case to determine whether the funds were subject to forfeiture.

While he agreed with the majority’s application of the inevitable discovery doctrine, Judge Easterbrook suggested in a concurring opinion that the parties failed to argue whether the exclusionary rule applied in civil forfeiture cases, which would have superseded the doctrine of inevitable discovery. In a detailed analysis relating to the exclusionary rule in civil forfeiture proceedings, Judge Easterbrook stated:

Suppressing the res in a civil proceeding, even though the property is subject to forfeiture, would be like dismissing the indictment in a criminal proceeding whenever the defendant was arrested without probable cause. The Supreme Court has been unwilling to use the exclusionary rule to "suppress" the

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157 Id. at 638.
158 Id.
159 Id. at 639.
160 Id.
161 Id. at 642.
162 Id. (Easterbrook, J., concurring).
body of an improperly arrested defendant. Why then would it be sensible to suppress the res?\textsuperscript{163}

Judge Easterbrook also distinguished \textit{Marrocco} from \textit{Plymouth}, stating that “[a]lthough [\textit{Plymouth}] suppressed evidence in a forfeiture, \textit{Janis} stated that this was because that forfeiture was intended as a criminal punishment. The forfeiture in our case is civil. It is farther from a criminal prosecution than is a probation-revocation proceeding.”\textsuperscript{164} Judge Easterbrook’s reference to a probation-revocation proceeding suggested an attempt to align the Seventh Circuit’s analysis with the analysis used in \textit{Scott}.\textsuperscript{165} Based on this inference, it would appear that Judge Easterbrook would invoke the cost-benefit test used in \textit{Janis},\textsuperscript{166} which was applied in \textit{Scott},\textsuperscript{167} to determine whether the social costs of applying the exclusionary rule outweigh the benefits of deterring officers in the context of civil forfeiture proceedings.\textsuperscript{168} While the court did not decide the scope of this inquiry, it appears reasonable to suggest that the Seventh Circuit would apply the balancing test established in \textit{Calandra} to determine whether to apply the exclusionary rule to civil forfeiture proceedings.\textsuperscript{169}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{163}] \textit{Id.} (citations omitted).
\item[\textsuperscript{164}] \textit{Id.} (citations omitted).
\item[\textsuperscript{165}] See \textit{id.}
\item[\textsuperscript{166}] See United States v. \textit{Janis}, 428 U.S. 433, 460 (1976).
\item[\textsuperscript{168}] See \textit{Marrocco}, 578 F.3d at 642 (Easterbrook, J., concurring).
\item[\textsuperscript{169}] See \textit{id.} at 643.
\end{enumerate}
\end{footnotesize}
VI. WITH THE VALIDITY OF PLYMOUTH IN QUESTION, WOULD THE SUPREME COURT’S COST-BENEFIT ANALYSIS BAR THE EXCLUSIONARY RULE IN CIVIL FORFEITURE PROCEEDINGS?

Since Plymouth, the Supreme Court has never applied the exclusionary rule to bar evidence outside the criminal trial context. \(^{170}\) While the Court has never directly overturned the holding in Plymouth, its decisions following Plymouth, \(^{171}\) coupled with the changing statutory construction of state and federal forfeiture statutes, \(^{172}\) suggests that Plymouth’s validity may be in jeopardy and that courts should analyze whether the exclusionary rule applies to civil forfeiture using the Court’s current cost-benefit analysis. \(^{173}\)

A. Plymouth’s Questioned Validity

Federal courts that have applied the exclusionary rule to civil forfeiture proceedings cite the precedent established in Plymouth to validate their rulings. \(^{174}\) The basis for their rulings revolves around the Plymouth Court’s classification of a civil forfeiture proceeding as “quasi-criminal.” \(^{175}\)

The evolution of state and federal forfeiture statutes has, however, created a clear distinction between the “quasi-criminal” forfeiture proceeding in Plymouth and current civil forfeiture proceedings. \(^{176}\) In


\(^{171}\) See id.


\(^{173}\) See Calandra, 414 U.S. at 354.

\(^{174}\) See e.g., United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1063 (9th Cir. 1994); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993).

\(^{175}\) See $191,910 in U.S. Currency, 16 F.3d at 1063; 7,850.00 in U.S. Currency, 7 F.3d at 1356.

\(^{176}\) See 21 U.S.C. § 881 (e)(1)(A); 720 ILL. COMP. STAT. 646/85(g)(1)–(3).
Plymouth, McGonigle’s violation of a Pennsylvania liquor law that permitted a fine also subjected his car to forfeiture.\(^{177}\) There, the Court classified the forfeiture proceeding as “quasi-criminal” because the forfeiture was viewed as an additional penalty for McGonigle’s commission of a crime.\(^{178}\) Since the holding in Plymouth, forfeiture statutes have evolved.\(^{179}\) The federal forfeiture statute does not require the individual possessing the property to be charged with a criminal offense; rather, the government need only establish by a preponderance of the evidence that the property seized was used in the commission of a criminal offense.\(^{180}\) For example, in Marrocco, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, the government initiated a forfeiture proceeding absent the claimant’s commission of a criminal offense.\(^{181}\) Because of the statutory differences in the forfeiture proceedings in Marrocco, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, \(^{182}\) the court’s reliance on Plymouth as precedent is called into question when determining whether the exclusionary rule applies to civil forfeiture proceedings.\(^{183}\)


\(^{178}\) Id. at 700.

\(^{179}\) See 18 U.S.C § 981(c)(3) (2006) (stating that if the Government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense).

\(^{180}\) Id. § 981(c)(1) (stating that the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture).

\(^{181}\) United States v. Marrocco, 578 F.3d 627, 630 (7th Cir. 2009); United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1056 (9th Cir. 1994) (the agents instructed the claimant of the illegally seized funds that he was free to leave or accompany the bags); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1356 (8th Cir. 1993).

\(^{182}\) See $191,910.00 in U.S. Currency, 16 F.3d at 1056; $7,850.00 in U.S. Currency, 7 F.3d at 1356.

\(^{183}\) See Plymouth, 380 U.S. at 702.
Furthermore, the *Plymouth* Court, while applying the exclusionary rule to forfeiture proceedings, narrowed its holding by stating that it applied only “to forfeiture proceedings such as the one involved here,” which indicated that the Court’s holding may be confined to the facts of that particular case.

Based on the statutory difference in forfeiture proceedings, and the notion that *Plymouth* is confined to its facts, the viability of *Plymouth* with respect to current forfeiture law is suspect, and a strong argument can be formed that the federal courts of appeals’ reliance on *Plymouth* is outdated and should be replaced with the Court’s current cost-benefit analysis.

B. *The Supreme Court’s Cost-Benefit Analysis Could Bar the Exclusionary Rule in Civil Forfeiture Proceedings*

Based on the analysis from cases that utilize the cost-benefit analysis, a strong argument can be formed that the Court’s cost-benefit approach could bar the exclusionary rule in civil forfeiture proceedings. Similar to the forfeiture proceedings in *Marrocco*, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, the forfeiture proceeding in $241,600.00 in U.S. Currency did not necessitate the claimant being found guilty of a criminal act. Because the case was outside the scope of *Plymouth*, the California court followed the precedent established in *Calandra* and applied the cost-benefit analysis to the civil forfeiture proceeding.

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184 *Plymouth*, 380 U.S. at 702.
186 See *Plymouth*, 380 U.S. at 702.
187 See *Scott*, 524 U.S. at 369; *Lopez-Mendoza*, 468 U.S. at 1050; *Janis*, 428 U.S. at 460; *Calandra*, 414 U.S. at 354.
189 *Id.* at 1113.
The California appellate court first weighed the deterrence value of extending the exclusionary rule to civil forfeiture proceedings. Because the exclusionary rule is already applied in criminal trials, the court concluded that the additional benefit of deterrence from excluding the evidence in the forfeiture proceeding would be marginal because the officers would be “punished” by the exclusion of evidence in state criminal trials. On the cost side, the court looked to the Janis holding, which stated that the societal costs are high due to the “inadmissibility of relevant, probative evidence.” In balancing both sides, the court declined to extend the exclusionary rule to civil forfeiture proceedings because the cost of excluding probative evidence outweighed any benefit of deterrence.

This conclusion is consistent with the Supreme Court’s holdings since Plymouth, which have declined to extend the exclusionary rule outside the criminal trial context, and are supported by the statutory distinction between current forfeiture statutes as compared with the statute relied upon in Plymouth. Thus, under one reading of Supreme Court precedent, application of the Court’s cost-benefit analysis could bar use of the exclusionary rule in civil forfeiture proceedings.

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190 Id.
191 Id.
192 Id.
VII. REGARDLESS OF SUPREME COURT PRECEDENT, THE EXCLUSIONARY RULE SHOULD APPLY TO CIVIL FORFEITURE PROCEEDINGS

Since *Plymouth*, the Supreme Court’s resistance in applying the exclusionary rule to civil proceedings is well-noted. Additionally, modern forfeiture statutes, which have evolved since *Plymouth*, have drawn into question whether the conclusion that civil forfeiture is a “quasi-criminal” proceeding is still viable today. Moreover, the *Plymouth* Court noted that its decision was narrow and applied only to “the forfeiture proceeding such as the one involved [in that case].” Notwithstanding the viability of *Plymouth* or the precedent in subsequent Supreme Court decisions, this Note argues in the following sections that the exclusionary rule should be applied in civil forfeiture proceedings.

A. Quasi-Criminal Forfeiture Proceeding Versus Civil Forfeiture Proceeding: A Distinction that Should Not Make a Difference

Recall that the purpose of the exclusionary rule is to deter future unlawful police conduct. As evidenced above, the first step that a court would take in holding that the exclusionary rule does not extend to civil forfeiture proceedings is to distinguish *Plymouth’s* “quasi-criminal” classification. Logically, it would follow that, by distinguishing *Plymouth*, a court would analyze its case using the Supreme Court’s cost-benefit analysis, which has never applied the exclusionary rule to civil proceedings. Does the distinction between a “quasi-criminal” proceeding and a civil proceeding impact whether adequate deterrence would be achieved? In inferring that the exclusionary rule might be barred from civil forfeiture proceedings,
Judge Easterbrook stated, “The forfeiture in our case is civil. It is farther from a criminal prosecution than is a probation-revocation proceeding.”204 Because the exclusionary rule was barred in probation-revocation proceedings, it would follow that the rule would be barred in a civil forfeiture hearing.205 The correlation between the “proceeding” and application of the exclusionary rule is furthered in the Janis holding, which stated, “[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding.”206 This idea was also prevalent in $241,600.00 in U.S. Currency, which first made sure to distinguish itself from Plymouth and qualify its proceeding as civil.207 However, a court that focuses on the nature of the proceeding when determining whether to invoke the exclusionary rule may overlook the primary goal of the exclusionary rule—i.e., deterrence.208

When examining the deterrence benefits in proceedings outside the criminal trial context the Supreme Court has focused on the fact that the exclusionary rule already bars evidence in criminal proceedings.209 Because the exclusionary rule is applied to criminal proceedings, courts have concluded that the additional benefit of deterrence from excluding the evidence outside the criminal trial context would be marginal because the officers are already “punished” by the exclusion of evidence in criminal proceedings.210 While this narrow approach fails to determine the actual motive of the officer who conducted the seizure, it also fails to adapt to overall changes in

204 United States v. Marrocco, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, J., concurring).
206 Janis, 428 U.S. at 447.
210 See e.g., $241,600 U.S. Currency, 67 Cal. App. 4th at 1113.
modern law enforcement objectives.\textsuperscript{211} There is no question that, when law enforcement officers act on the spur of the moment to seize evidence and stop crime, “[t]heir fear of evidentiary suppression in the criminal trial will have as much deterrent effect as can be expected”;\textsuperscript{212} however, in situations where the officer has first identified the person he is investigating, the deterrence value in that specific instance may increase.\textsuperscript{213}

In the changing climate of police investigations, the characterization of the proceeding becomes irrelevant, as a court’s overall goal should be to determine whether adequate deterrence has been achieved, which can be fulfilled only by evaluating the changing objectives of law enforcement agencies that conducted the illegal search.\textsuperscript{214}

### B. The Changing Objective of Law Enforcement Agencies

Civil forfeiture has evolved as a main objective in modern law enforcement.\textsuperscript{215} The first step developed in the \textit{Calandra} Court’s cost-benefit test is to determine whether an officer who conducted the illegal search would be further deterred if the exclusionary rule were applied and the illegally seized evidence were suppressed.\textsuperscript{216} Traditionally, the Court has concluded that law enforcement officers are consciously directed towards criminal prosecution, which limits any additional deterrence that would be achieved through suppression of evidence in a subsequent proceeding.\textsuperscript{217} However, modern law

\begin{itemize}
\item \textsuperscript{211} Crandley, \textit{supra} note 128, at 160.
\item \textsuperscript{212} \textit{Scott}, 524 U.S. at 373 (Souter, J., dissenting).
\item \textsuperscript{213} \textit{Id}.
\item \textsuperscript{214} \textit{Tirado v. Comm’r of Internal Revenue}, 689 F.2d 307, 310 (2d Cir. 1982) (holding that determining when the likelihood of substantial deterrence justifies excluding evidence requires some assessment of the motives of the officials who seized the challenged evidence).
\item \textsuperscript{215} Crandley, \textit{supra} note 128, at 178.
\item \textsuperscript{216} \textit{United States v. Calandra}, 414 U.S. 338, 352 (1974).
\end{itemize}
enforcement objectives have evolved, which would result in substantial deterrence if the exclusionary rule were applied to civil forfeiture proceedings.218

1. Modern legislation has provided a changing objective for law enforcement officers in forfeiture cases.

Congressional legislation, which for over twenty years “has expanded the reach of forfeiture laws,” provides evidence to support the changing focus of modern law enforcement agencies.219 In 1970, Congress passed 21 U.S.C. § 881, which authorized “the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs.”220 The statute’s purpose was to inhibit the spread of drugs in a way that criminal prosecution could not—“by striking at its economic roots.”221 Criminal prosecution may send a drug dealer to jail; however, the operation of the criminal organization would most likely continue under the guidance of a subordinate who would likely take over his position.222 By attacking the means of production, forfeiture could stop the drug trafficking business for good.223 Since the initial statute was passed, Congress has consistently expanded the reach of the statute to include proceeds traceable to drug transactions.224 Congressional encouragement and advancement of the forfeiture statute provides evidence that modern law enforcement objectives have evolved to focus on civil forfeiture proceedings.225

218 Crandley, supra note 128, at 166–67.
219 Id. at 166.
221 Id.
222 Id.
223 Id.
224 Id. at 45.
225 Crandley, supra note 128, at 166.
2. Changing governmental policy reflects the changing objectives of modern law enforcement agencies.

The Asset Forfeiture Policy Manual of the United States Department of Justice also suggests that law enforcement objectives have shifted towards forfeiture.\(^{226}\) The guidelines produced by the Department of Justice for asset forfeiture illustrate the complex planning that is involved in forfeiture proceedings.\(^{227}\) Detailed in the 2007 “pre-seizure planning” section is the equity threshold necessary to pursue a forfeiture.\(^{228}\) The plan requires that the minimum amount of cash to be pursued exceed $5,000.\(^{229}\) Furthermore, vehicles must exceed $5,000 in value, vessels must exceed $10,000, and aircraft must exceed $10,000.\(^{230}\) Additionally, the plan notes that prior to the seizure, the agency must determine whether any liens or mortgages are involved in the property being pursued so that officers may determine whether the agency should go forward with the seizure.\(^{231}\) The specificity illustrated in the “pre-seizing” section illustrates the conscious direction of law enforcement officers in targeting forfeiture.\(^{232}\)

3. Civil proceedings provide law enforcement agencies with an easier and more efficient tool for crime prevention.

Civil forfeiture also provides law enforcement with an efficient and effective weapon in the war against drugs.\(^{233}\) The changing nature of criminal activity has led law enforcement agencies to use civil


\(^{227}\) Id. at 5.

\(^{228}\) Id.

\(^{229}\) Id. at 6.

\(^{230}\) Id.

\(^{231}\) U.S. DEP’T OF JUSTICE, supra note 226, at 8.

\(^{232}\) See id.

\(^{233}\) Crandley, supra note 128, at 161.
remedies to achieve criminal justice goals. Generally, “civil remedies are easier to use, more efficient, and less costly than criminal prosecutions.”

Procedural advantages have also led civil forfeiture to become a popular remedy among law enforcement agencies. The two most important advantages stem from the legal fiction derived from forfeiture cases, that “the property is guilty and on trial.” First, forfeiture may be pursued even when a lack of sufficient evidence prevents a criminal conviction. While criminal prosecutions require an offender to be found guilty beyond a reasonable doubt, in a civil forfeiture proceeding, the government only needs to establish that the property is subject to forfeiture by a preponderance of the evidence in order to effectuate forfeiture. Second, forfeiture proceedings lack constitutional safeguards that are present in criminal prosecution hearings. A claimant, challenging the government’s seizure of property, is not afforded the right to an attorney, does not receive a presumption of innocence, and is unable to use the hearsay objection. These procedural advantages suggest that the objectives of law enforcement officers have been modified to attack drug trafficking in an easier and more efficient manner.

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235 Id. at 1345.
236 Blumenson & Nilsen, supra note 220, at 46.
237 Id. at 47.
238 id.
239 See 18 U.S.C. § 981(c)(1) (2006) (stating that the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture).
240 Blumenson & Nilsen, supra note 220, at 46.
241 Id. at 48.
242 Cheh, supra note 234, at 1345.
4. The Financial Incentive of Forfeiture and Its Impact on Law Enforcement Objectives

Law enforcement’s evolving focus on civil forfeiture is also supported by the financial incentive achieved through its use.243 In 1984, Congress enacted two amendments that expanded the power of forfeiture.244 The bill’s first amendment provided federal law enforcement agencies the right to retain and use proceeds from asset forfeitures.245 The second amendment created the federal “equitable sharing” program, which provided state and local agencies the greater share of proceeds even when federal agents were involved in the arrest.246 The equitable sharing program included a “federal adoption” procedure, which allowed state agencies that turned seized assets over to the Justice Department for federal forfeiture to receive back up to 80% of the assets’ value.247 These amendments provide state and federal law enforcement officers with “a financial motivation to expand forfeiture.”248 This incentive also appears in state statutes, which allow law enforcement agencies to retain certain percentages of assets obtained.249 As a result, the financial incentive provided to law

243 Blumenson & Nilsen, supra note 220, at 50.
244 Id.
245 See 21 U.S.C. § 881(e)(1)(A) (2006) (stating that forfeited property may be transferred to any federal agency or to any state or local law enforcement agency that participated directly in the seizure or forfeiture of the property); see also Blumenson & Nilsen, supra note 220, at 50.
246 Blumenson & Nilsen, supra note 220, at 51.
247 Id.
248 Crandley, supra note 128, at 170.
249 See, e.g., 720 ILL. COMP. STAT. 646/85 (g)(1)–(3) (stating that 65% shall be distributed to the metropolitan enforcement group or local, municipal, county, or State law enforcement agency or agencies that conducted or participated in the investigation resulting in the forfeiture; 12.5% shall be distributed to the Office of the State’s Attorney of the county in which the prosecution resulting in the forfeiture was instituted; 12.5% shall be distributed to the Office of the State’s Attorney’s Appellate Prosecutor; and 10% shall be retained by the Department of State Police for expenses related to the administration and sale of seized and forfeited property).
enforcement agencies further suggests that modern policing objectives have evolved to focus on civil forfeiture proceedings.

5. Civil forfeiture statistics support the changing objective of law enforcement agencies.

Law enforcement’s increasing focus on forfeiture, which is shown by the Department of Justice’s policy manual,\(^\text{250}\) Congressional legislation,\(^\text{251}\) the efficiency of civil proceedings,\(^\text{252}\) and financial incentives,\(^\text{253}\) is supported in the Justice Department’s Asset Forfeiture Fund, which reported $1.4 billion forfeited during the 2009 fiscal year.\(^\text{254}\) In comparison, in 1994, the Justice Department took just under $550 million.\(^\text{255}\) These statistics suggest that, contrary to the assertion that criminal law enforcement officers are focused only on criminal prosecution, civil forfeiture has, in fact, evolved to be a significant mechanism to hinder illegal conduct.\(^\text{256}\) Moreover, unlike tax assessments,\(^\text{257}\) parole revocations,\(^\text{258}\) or deportation hearings,\(^\text{259}\) which clearly fall outside the conscious direction of law enforcement officers, the statistics above support the idea that civil forfeiture is “ingrained into mainstream police practices.”\(^\text{260}\) The congressional advancement of forfeiture statutes, the policy underlined in the Justice

\(^{250}\) See U.S. Dep’t of Justice, supra note 226, at 5.


\(^{252}\) See Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333; Crandley, supra note 128, at 161.

\(^{253}\) See 21 U.S.C. § 881(e)(1)(A) (2006); 720 ILL. COMP. STAT. 646/85 (g)(1)–(3).


\(^{255}\) Crandley, supra note 128, at 162.

\(^{256}\) Id.


\(^{260}\) Crandley, supra note 128, at 159–60.
Department’s manual, the efficiency of civil forfeiture procedures, and financial incentives, all serve as indicators that modern law enforcement officers have expanded their objective focus to civil forfeiture.\footnote{Id. at 161; see also Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333.}

C. Deterrence and the Changing Law Enforcement Objective

Modern legislation,\footnote{See 21 U.S.C. § 881 (2006).} agency policy,\footnote{See U.S. DEP’T OF JUSTICE, supra note 226, at 5.}\footnote{Blumenson & Nilsen, supra note 220, at 50.} and greater financial incentive\footnote{Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333; Crandley, supra note 128, at 161.}\footnote{Blumenson & Nilsen, supra note 220, at 160.} provide sufficient evidence to conclude that modern law enforcement officers have expanded their objective focus to forfeiture.\footnote{Blumenson & Nilsen, supra note 220, at 55.} Historically, criminal conviction was the primary objective in crime prevention; however, today, forfeiture enables law enforcement agencies to fight crime and raise money at the same time.\footnote{See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 373 (1998) (Souter, J., dissenting).} Moreover, pre-seizure planning adds validity to the dissent in \textit{Scott}, which suggested that a law enforcement officer will have “first identified the person he has his eye on,” which in turn may increase the level of deterrence achieved through application of the exclusionary rule in civil forfeiture proceedings.\footnote{Crandley, supra note 128, at 175.} Because of this, courts must adapt their perspective in analyzing the deterrence of officers, in order to gauge the significant benefit of deterrence that would be achieved by applying the exclusionary rule in civil forfeiture proceedings.\footnote{Crandley, supra note 128, at 151.}
D. Societal Costs in Applying the Exclusionary Rule to Civil Forfeiture

The societal costs are low in the context of civil forfeiture. The second step in the Calandra analysis is to determine the societal costs of applying the exclusionary rule to civil forfeiture proceedings.\textsuperscript{270} Evidence that could be linked to criminal activity “concededly is relevant evidence,” the exclusion of which would impose a significant cost to society.\textsuperscript{271} However, the procedural advantages related to civil forfeiture help to alleviate these costs.\textsuperscript{272} First, notwithstanding the exclusion of illegally obtained evidence, the government may establish underlying criminal activity that would lead to forfeiture by introducing additional evidence from an independent source, untainted by the illegal search.\textsuperscript{273} Additionally, the government may introduce evidence obtained illegally as long as it can illustrate that the inevitable discovery doctrine would apply.\textsuperscript{274} Procedural advantages also diminish the costs of excluding the relevant evidence.\textsuperscript{275} The government’s burden of proof, which is beyond a reasonable doubt in criminal trials, is lowered to only a preponderance of the evidence in a forfeiture proceeding.\textsuperscript{276} Furthermore, constitutional safeguards that are present in criminal trials are absent from civil forfeiture

\textsuperscript{272} Crandley, \textit{supra} note 128, at 176.
\textsuperscript{273} United States v. Price, 558 F.3d 270, 281 (3d Cir. 2009) (citing Murray v. United States, 487 U.S. 533, 537 (1988)) (“The independent source doctrine serves as an exception to the exclusionary rule and permits the introduction of ‘evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.’”).
\textsuperscript{274} United States v. Marrocco, 578 F.3d 627, 637 (7th Cir. 2009) (citing Nix v. Williams, 467 U.S. 431, 444 (1984)) (stating that application of the inevitable discovery doctrine is proper so long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means”).
\textsuperscript{275} Crandley, \textit{supra} note 128, at 176.
\textsuperscript{276} Blumenson & Nilsen, \textit{supra} note 220, at 48.
Finally, even if an illegal search occurs, in the instances where the seized item is contraband, the government is not required to return the property because of its inherent illegality. Thus, the costs of barring relevant evidence from civil forfeiture proceedings are minimized due to the procedural advantages given to civil forfeiture and the government’s ability to introduce evidence to support forfeiture through the doctrines of inevitable discovery and independent source.

E. The Benefits of Deterrence Outweigh the Costs to Society in the Context of Civil Forfeiture Proceedings

As illustrated above, modern police objectives have evolved to focus on forfeiture. Because of this increased focus, the level of deterrence that would be achieved in extending the exclusionary rule to civil forfeiture would be substantial. Additionally, while costs relative to society would arise from excluding relevant evidence from trial, procedural mechanisms, the inevitable discovery doctrine, and the independent source doctrine help to prevent these costs from harming the administrative function of civil forfeiture proceedings. Thus, in weighing the benefits of deterrence against the costs to society, the benefits that accrue due to law enforcement’s changing objectives outweigh the social costs, and, as a result, even if

277 Id. (stating there is no presumption of innocence, no right to an attorney, and no hearsay objection afforded to claimants in civil forfeiture cases).
278 Crandley, supra note 128, at 178.
279 See Marrocco, 578 F.3d at 637; United States v. Price, 558 F.3d 270, 281 (3d Cir, 2009); see also Crandley, supra note 128, at 176.
280 U.S. DEP’T OF JUSTICE, supra note 220, at 6; see also Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333; Crandley, supra note 128, at 161.
281 Crandley, supra note 128, at 161.
282 See Blumenson & Nilsen, supra note 220, at 50.
283 See Marrocco, 578 F.3d at 637.
284 See Price, 558 F.3d at 281 (3d Cir. 2009).
the *Plymouth* precedent were overturned, the exclusionary rule should be applied in the context of civil forfeiture proceedings.

**CONCLUSION**

The uncertain viability of *Plymouth*, coupled with Supreme Court precedent following *Plymouth*, has brought into question the applicability of the exclusionary rule in civil forfeiture proceedings. Because the Court has consistently focused on criminal prosecution as the sole objective of law enforcement, the Court, using a cost-benefit analysis, has refused to extend the exclusionary rule to civil proceedings.286 However, the changing objectives of law enforcement agencies have led forfeiture to become “ingrained into mainstream police practices.”287 Thus, “[t]he unique role of civil forfeiture in modern policing makes it sui generis in the level of deterrence the exclusionary rule will produce” and would not be outweighed by the minimal costs associated with the relatively government-friendly proceeding.288

However, application of the exclusionary rule in civil forfeiture proceedings would create new questions, which up to this point have been left unanswered. Property seized by law enforcement agencies is classified into two different categories: 1) contraband *per se* and 2) derivative contraband.289 Contraband *per se* is forfeitable without regard to the right of the owner due to its inherent illegality.290 In contrast, forfeiture of derivative contraband requires the government to establish by a preponderance of the evidence that the property was used, or intended to be used, to facilitate the commission of a crime.291

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288 *Id.*


290 *Id.* at 475.

291 *Id.* at 475–76.
Money is not contraband *per se*, and thus, the government must establish by a preponderance of the evidence that it was used, or intended to be used, to facilitate a violation of the law.\(^{292}\)

In a situation where money that was illegally seized is the sole evidence offered by the government, and neither the inevitable discovery doctrine\(^{293}\) nor the independent source doctrine\(^{294}\) applies, it would be impossible to establish that the money was in fact derivative contraband, due to the application of the exclusionary rule. However, even in the absence of evidence, a strong presumption that the money is illegal can be supported due to the thorough planning efforts that predate the seizure.\(^{295}\) While this presumption cannot be used as evidence, courts will be left with the question of what to do with the money.

Certainly, public policy dictates that the agency that conducted the illegal search should not benefit from it. Releasing money, however, that carries a presumption that it is associated with illegal activity would also be contrary to public policy. When the exclusionary rule is applied in a criminal setting, the only person receiving the benefit of the rule is the person whose rights were violated; however, in the context of civil forfeiture, the release of the property would not only benefit the carrier of the funds, but potentially the entire criminal organization that is supported by the funds. Thus, the application of the exclusionary rule in the context of civil forfeiture proceedings would leave courts with a new dilemma—what should be done with the money, which is a question that will be left for another day.


\(^{293}\) See United States v. Marrocco, 578 F.3d 627, 637 (7th Cir. 2009) (citing Nix v. Williams, 467 U.S. 431, 444 (1984)) (stating that the inevitable discovery is proper so long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means”).

\(^{294}\) See United States v. Price, 558 F.3d 270, 281 (3d Cir. 2009) (citing Murray v. United States, 487 U.S. 533, 537 (1988)) (“The independent source doctrine serves as an exception to the exclusionary rule and permits the introduction of ‘evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.’”).