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ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE IN SUBSEQUENT CIVIL PROCEEDINGS: FOCUSING ON MOTIVE TO DETERMINE DETERRENCE

INTRODUCTION

The exclusionary rule,¹ once premised on notions of personal right and judicial integrity,² is now invoked primarily to deter³ government

1. In 1914, in *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court adopted the exclusionary rule as a means of enforcing the fourth amendment guarantee against unreasonable searches and seizures. *Id.* at 398. *Weeks*, however, held only that evidence seized in violation of the fourth amendment would be inadmissible in federal criminal trials. Nearly fifty years passed before the rule was extended to state criminal prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling*, *Wolf v. Colorado*, 338 U.S. 25 (1949). The *Wolf* Court had refused to extend the rule to the states, notwithstanding its holding that the fourth amendment was incorporated into the due process clause of the fourteenth amendment. The *Wolf* Court had concluded that the *Weeks* exclusionary rule was a matter of judicial implication and not an explicit command of the fourth amendment. 338 U.S. at 28; see Note, *Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule*, 46 *Fordham L. Rev.* 139, 139-43 (1977) [hereinafter cited as *Reason and the Fourth Amendment*]. Whether the exclusionary rule is a matter of constitutional right or merely a judicially created remedy to enforce the fourth amendment guarantee against unreasonable searches is of great importance in determining how far the rule should extend. The precise nature of the rule, however, has been the subject of much debate. Justice Brennan has argued that the rule is constitutionally based and is intended to “[accomplish] the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior.” *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). The *Calandra* Court, however, treated the rule as merely a judicially created tool, not a right in itself. *Id.* at 348. This view has persisted and has been criticized. See, e.g., Yarbrough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 *Am. J. Crim. L.* 1 (1978). Yarbrough pointed out that “it is highly debatable whether the Court even has authority to impose non-constitutional standards such as . . . *Mapp-Weeks* are now purported to have established, at least in state cases.” *Id.* at 18. This controversy is beyond the scope of this Note. For purposes of discussion within this Note the rule will be viewed from the perspective of the *Calandra* majority.

2. Historically, three major theories have been advanced as justifications for the exclusionary rule: the enforcement of a personal right, the maintenance of judicial integrity and the deterrence of official misconduct. See, e.g., Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 *Wash. U.L.Q.* 621, 640-52; Note, *Confusion Regarding Exclusion: The Evolution of the Fourth Amendment*, 23 *Ariz. L. Rev.* 801, 802-06 (1981). Geller also suggests several other possible bases for the rule. Geller, *supra*, at 652-56. Under the personal right theory, the goal of the exclusionary rule is the vindication of a personal right secured by the Constitution. See *Dodge v. United States*, 272 U.S. 530, 532 (1926); *Gouled v. United States*, 255 U.S. 298, 303-06 (1921); *Weeks v. United States*, 232 U.S. 383, 393 (1914); Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, *Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979-1980*, 69 *Geo. L.J.* 151, 191 (1980); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule*

officials from committing fourth amendment violations.⁴ Courts employ a balancing test to determine whether the likely deterrent effect of exclusion outweighs the benefit to society of admitting the tainted evidence in a given situation.⁵ This balancing is generally conducted with reference to the particular proceeding in which the seizing offi-

as a Constitutional Requirement, 59 Minn. L. Rev. 251, 272 (1974); Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 Am. Crim. L. Rev. 507, 508-10 (1975) [hereinafter cited as *Past, Present, No Future*]. The essence of the judicial integrity theory is a refusal to allow the judiciary to become an accomplice to the constitutional violation through the admission of illegally seized evidence. See *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968); *Elkins v. United States*, 364 U.S. 206, 222-23 (1960); *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Saltzburg*, *supra*, at 192; *Past, Present, No Future*, *supra*, at 510-11.

3. The deterrence rationale is based on the theory that the exclusion of illegally seized evidence will deter future police misconduct. *Stone v. Powell*, 428 U.S. 465, 484 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Past, Present, No Future*, *supra* note 2, at 511-17. The Supreme Court has made it clear that this rationale is the primary, if not sole, purpose for the rule. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). The *Calandra* Court stated that "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348. It should be noted however, that the deterrence view of the exclusionary rule is arguably inconsistent with the Court's traditional view on standing for fourth amendment violations. Only the individual personally aggrieved whose "legitimate expectation of privacy" has been invaded, has standing to raise the issue. *United States v. Payner*, 447 U.S. 727, 731 (1980); see *Brown v. United States*, 411 U.S. 223, 229-30 (1973); *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Wong Sun v. United States*, 371 U.S. 471, 492 (1963). This apparent conflict has generated some comment. See, e.g., Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 Or. L. Rev. 151, 162-67 (1979); Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 Iowa L. Rev. 493, 503-07 (1980); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 734-36 (1970); Note, *Judicial Control of Illegal Search and Seizure*, 58 Yale L.J. 144, 154-58 (1948).

4. The fourth amendment 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.

U.S. Const. amend. IV.

5. The balance of interests test said to be implicit in all fourth amendment exclusionary rule decisions, was made explicit by the Supreme Court in *United States v. Calandra*, 414 U.S. 338, 348-54 (1974). The Court stated that a weighing of the potential benefits of exclusion against the potential harm of losing relevant evidence is required. See *id.* For discussion and criticism of how this balance of interests test has been articulated and applied, see 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.5 (1978); Burkoff, *supra* note 3, at 168-72.

cial intended the evidence to be used.⁶ A more complicated issue arises when evidence, which would be or has been excluded from the proceeding it was apparently intended for, is introduced in a subsequent civil action.⁷

In *United States v. Janis*,⁸ the Supreme Court was squarely presented with this issue. The Court's opinion, however, does not provide definitive guidelines, for its holding is narrow and its language ambiguous. Consequently, lower courts interpreting *Janis* have taken a variety of approaches in both government and private civil litigation.

Some courts, in applying the balance of interest test, place undue reliance on the nature of the proceeding, and extend the exclusionary rule only to civil actions that are "quasi-criminal" in nature.⁹ Others

6. Application of the balancing test to civil proceedings for which the search was conducted has led to differing results. *Compare* *Wong Chung Che v. Immigration & Naturalization Serv.*, 565 F.2d 166, 169 (1st Cir. 1977) (deportation hearing; evidence inadmissible) and *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223, 238-39 (E.D. Tex. 1980) (high school student disciplinary hearing; evidence inadmissible) and *Smyth v. Lubbers*, 398 F. Supp. 777, 793-95 (W.D. Mich. 1975) (college student disciplinary hearing; evidence inadmissible) with *Donovan v. Federal Clearing Die Casting Co.*, 695 F.2d 1020, 1022-25 (7th Cir. 1982) (OSHA enforcement proceeding; evidence admissible) and *Robberson Steel Co. v. Occupational Safety & Health Review Comm'n*, 645 F.2d 22, 22 (10th Cir. 1980) (per curiam) (same).

7. The term "subsequent" civil proceeding is used in a broad sense and is not limited only to situations in which the civil proceeding is instituted after the conclusion of the proceeding for which the search was conducted. For example, conceivably the civil proceeding in issue will be instituted in lieu of the originally contemplated action. *See, e.g., Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391, 404 (S.D. Iowa 1968), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); *Rinderknecht v. Maricopa County Employees Merit Sys.*, 21 Ariz. App. 419, 421-22, 520 P.2d 332, 334-35, *vacated after settlement*, 111 Ariz. 174, 526 P.2d 713 (1974).

8. 428 U.S. 433 (1976).

9. Cases invoking the quasi-criminal/civil distinction in deciding whether to extend the rule include: *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-02 (1965) (forfeiture proceeding held quasi-criminal; extended the rule); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir.) (action by insured against insurer held purely civil; refused to extend rule), *cert. denied*, 421 U.S. 1011 (1975); *Romano v. Home Ins. Co.*, 490 F. Supp. 191, 193 (N.D. Ga. 1980) (dictum) (same); *United States v. One 1976 Cadillac Seville*, 477 F. Supp. 879, 883 (E.D. Mich. 1979) (forfeiture proceeding held quasi-criminal; extended the rule); *Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391, 407 (S.D. Iowa 1968) (antitrust suit held quasi-criminal; extended the rule), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); *United States v. Blank*, 261 F. Supp. 180, 182 (N.D. Ohio 1966) (enforcement of wagering excise tax provisions held quasi-criminal; extended the rule); *Rinderknecht v. Maricopa County Employees Merit Sys.*, 21 Ariz. App. 419, 421-22, 520 P.2d 332, 334-35 (employee disciplinary proceeding held quasi-criminal; extended the rule), *vacated after settlement*, 111 Ariz. 174, 526 P.2d 713 (1974); *Lamartiniere v. Department of Employment Sec.*, 372 So. 2d 690, 692

rely on an inter/intrasovereign distinction, making the identity of the sovereign the dispositive factor in the balance.¹⁰ Still other courts, rather than relying on either the identity of the sovereign or the nature of the proceeding, apply the balance of interests test on a case-by-case basis.¹¹

This Note contends that these approaches fail to give appropriate consideration to the primary goal of the exclusionary rule—deterrence. In place of these tests, this Note urges the adoption of the test utilized by the Second Circuit in *Tirado v. Commissioner*.¹² The *Tirado* analysis seeks to determine whether the official responsibilities and personal interests of the seizing officer are at all related to the subsequent civil proceeding. This inquiry will reveal whether use of the tainted evidence in the civil proceeding provided an incentive for the illegal search. If so, excluding the evidence achieves the deterrent effect of the exclusionary rule. Furthermore, by exploring the motives of the seizing official, the Second Circuit approach best serves the needs of society by excluding relevant evidence only when necessary to compel compliance with the fourth amendment. Moreover, by establishing guidelines this test facilitates consistent application of the exclusionary rule in all civil proceedings.

(La. App.) (unemployment compensation hearing held purely civil; refused to extend rule), *writ denied*, 375 So. 2d 945 (La. 1979); *New Brunswick v. Speights*, 157 N.J. Super. 9, 21, 384 A.2d 225, 231 (Middlesex County Ct. 1978) (dictum) (would extend in police department disciplinary proceeding). The term “quasi-criminal” pertains to those offenses known as quasi-crimes. One authority has defined “quasi-crimes” as all offenses not crimes or misdemeanors, but that are in the nature of crimes. A class of offenses against the public which have not been declared crimes, but wrongs against the general or local public which it is proper [to repress or punish] by forfeitures and penalties. [The term] embrace[s] all *qui tam* actions and forfeitures imposed for the neglect or violation of a public duty . . . whether voluntary or involuntary, [or] where a penalty is given, whether recoverable by criminal or civil process.

Black's Law Dictionary 335 (5th ed. 1979).

10. *See, e.g., Vander Linden v. United States*, 502 F. Supp. 693, 697 (S.D. Iowa 1980) (evidence excluded because intrasovereign violation); *Velasco v. IRS*, 80-2 U.S. Tax Cas. (CCH) ¶ 9590, at 84,924 (S.D.N.Y. 1980) (evidence not excluded because intersovereign violation); *Gaston v. United States*, 79-1 U.S. Tax Cas. (CCH) ¶ 9126, at 86,087 (N.D. Ga. 1978) (same); *Guzzetta v. Commissioner*, 78 T.C. 173, 180-84 (1982) (same). The term “intrasovereign” refers to a factual situation in which all the parties involved—that is, the seizing officials and the officials who seek to use the evidence—are agents of the same sovereign.

11. *See, e.g., Jonas v. City of Atlanta*, 647 F.2d 580, 587 (5th Cir. 1981) (societal interest in obtaining accurate factual findings outweighs deterrent value of exclusion); *People v. Harfmann*, 638 P.2d 745, 748 (Colo. 1981) (societal interest in protecting public from unethical lawyers outweighs deterrent value of exclusion).

12. 689 F.2d 307 (2d Cir. 1982).

I. JANIS: CREATING UNCERTAINTY

A. *The Supreme Court Decision*

The applicability of the exclusionary rule to civil proceedings has never been fully resolved by the Supreme Court.¹³ The most recent Supreme Court case to consider the rule's application to a civil action is *United States v. Janis*.¹⁴ *Janis* involved an Internal Revenue Service (IRS) assessment for unpaid wagering taxes. The assessment had been calculated solely on the basis of evidence¹⁵ illegally seized by state police officers investigating alleged bookmaking activity.¹⁶ Soon after the seizure, the IRS was notified of Janis' arrest and allowed access to the seized evidence.¹⁷ As a result, the IRS assessed wagering excise taxes in the amount of \$89,026.09.¹⁸ Because the search was conducted pursuant to a defective warrant, the evidence was subsequently suppressed at the state criminal proceeding.¹⁹ With the exception of the cash, which had been levied upon by the IRS, the items seized were ordered returned.²⁰ Janis filed suit for a refund of the cash, and the government counterclaimed for the balance of the assessment.²¹

The issue as framed by the Court was a narrow one: "Is evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, inadmissible in a civil proceeding by or against the United States?"²² In answering this question in the

13. See *supra* notes 6-8 and accompanying text.

14. 428 U.S. 433 (1976).

15. *Id.* at 437. The evidence consisted of \$4940 in cash and wagering records. *Id.* at 436.

16. *Id.* at 434-38.

17. *Id.* at 436. Although there was no formal liaison arrangement and no departmental policy requiring the police officer to report to the IRS, the officer not only reported the arrest, but also assisted the agent in analyzing the wagering records. *Id.*

18. *Id.* at 437. The amount was computed by determining the average daily gross proceeds for the five-day period covered by the seized materials and multiplying by the period of police surveillance. *Id.*

19. *Id.* at 437-38. The warrant was held invalid under *Spinelli v. United States*, 393 U.S. 410 (1969). 428 U.S. at 437-38.

20. 428 U.S. at 438.

21. *Id.* The suit was filed after Janis' claim for refund was dishonored by the IRS. *Id.*

22. *Id.* at 434. At present it remains unsettled whether the goal of deterrence mandates the exclusion in criminal proceedings of evidence illegally seized by officials acting in good faith. This question may be resolved by the Court's decision in *State v. Gates*, 85 Ill. 2d 376 (1981), *reargument ordered*, 103 S. Ct. 436 (1982), expected in this Term. This proposed good faith exception has been the subject of much discussion. See, e.g., Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 Vand. L. Rev. 501, 507-17 (1982); *Justice in the Eighties: The Exclusionary Rule and the Principle*

negative, the Court first reaffirmed deterrence of unlawful police conduct as the prime, if not sole, purpose of the exclusionary rule.²³ Applying the balance of interests test developed in *United States v. Calandra*,²⁴ the Court stated that the marginal additional deterrence that might result from exclusion in the tax proceeding was so slight that it could not outweigh the great societal cost of excluding this highly relevant evidence.²⁵

The factors relied upon by the Court in striking this balance are unclear. The Court seemingly placed heavy reliance on the fact that the seizing officials and the agency seeking to use the evidence were agents of different sovereigns.²⁶ The Court, however, undermined the importance of this intersovereign distinction by specifically refusing to

of Judicial Integrity, 65 *Judicature* 354, 359 (1982). Whether or not a good faith exception is created by the Court, the issue discussed in this Note will remain, for clearly not all violations of the fourth amendment are technical violations made in good faith. A classic example of a search conducted in bad faith is found in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971). This search was conducted by federal agents some fifty years after the decision in *Weeks v. United States*, 232 U.S. 383 (1914) introduced the exclusionary rule into federal prosecutions. It is apparent that the problem of bad faith searches has not been, nor is likely to be, eradicated. For an enumeration of various bad faith searches, see cases cited in *United States v. United States Dist. Court*, 407 U.S. 297, 326-33 (1972) (Douglas, J., concurring).

23. 428 U.S. at 446 (citing *United States v. Peltier*, 422 U.S. 531, 536-39 (1975)); *United States v. Calandra*, 414 U.S. 338, 347 (1974). The *Janis* Court stated: "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." 428 U.S. at 443 n.12. (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). In addition, the *Janis* Court clearly relegated the judicial integrity justification for the rule to a minor role. 428 U.S. at 458 n.35. This is in line with the Court's reasoning in *United States v. Calandra*, 414 U.S. 338 (1974), in which the personal right theory had already been abandoned. *Id.* at 348.

24. 414 U.S. 338 (1974).

25. 428 U.S. at 453-54. The *Janis* Court acknowledged that the deterrent effect of the rule has never been established with empirical certainty, and that it knew of no study on the "possible deterrent effect of excluding evidence in a civil proceeding." *Id.* at 452 n.22. The actual deterrent effect of the rule is indeed unclear and has been the subject of much debate. Although expressing doubts about the rule's effect, the Court as yet has declined to abandon the rule and its deterrence rationale. For a discussion of the effectiveness of the rule as a deterrent, see Oaks, *supra* note 3, at 678-736; Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 *Am. J. Crim. L.* 25, 28-48 (1978). Some commentators have suggested that new evidence indicates the success of the rule as a deterrent. See Canon, *Is The Exclusionary Rule in Failing Health? New Data and A Plea Against A Precipitous Conclusion*, 62 *Ky. L.J.* 681, 701 (1974); Geller, *Is the Evidence in on the Exclusionary Rule?*, 67 *A.B.A. J.* 1642, 1642-44 (1981); Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 *Judicature* 66, 70-73 (1978).

26. See 428 U.S. at 455-59.

consider whether the exclusionary rule should be extended in the event of an intrasovereign violation.²⁷

The Court was also influenced by the purely civil nature of the proceeding. It distinguished this case from the quasi-criminal actions to which the exclusionary rule had been extended.²⁸ Justice Stewart, in his dissenting opinion, was also swayed by the nature of the proceeding, but toward the opposite conclusion. He concluded that the wagering excise tax provisions involved rendered the proceeding quasi-criminal in nature, and therefore he would have excluded the illegally seized evidence.²⁹

B. *The Aftermath*

Thus, the *Janis* decision did not make clear whether the identity of the sovereign, the nature of the proceeding, or a combination of factors persuaded the Court not to extend the exclusionary rule. As a result, some courts have read the majority opinion and Stewart's dissent as a refusal to extend the exclusionary rule to subsequent civil proceedings, except those of a quasi-criminal nature.³⁰ Others have relied on extensive references in *Janis* to the intersovereign nature of the violation and have formulated a test based upon an intersovereign versus intrasovereign distinction. Accordingly, these courts extend the rule to civil cases only when the seizing officials and the proponents of the evidence are agents of the same sovereign.³¹ Still other courts

27. *Id.* at 456 & n.31.

28. *Id.* at 447 & n.17.

29. *Id.* at 461-63 (Stewart, J., dissenting). Justice Brennan, with whom Justice Marshall concurred, also dissented on the grounds that the exclusionary rule is "a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment." *Id.* at 460 (Brennan, J., dissenting). Justice Brennan reiterated his objections voiced in *United States v. Calandra*, 414 U.S. 338, 355-67 (1974) (Brennan, J., dissenting) and *United States v. Peltier*, 422 U.S. 531, 556-62 (1975) (Brennan, J., dissenting). 428 U.S. at 460 (Brennan, J., dissenting). At least one other court and several commentators have argued that wagering excise tax statutes are quasi-criminal in nature. *See, e.g.*, *United States v. Blank*, 261 F. Supp. 180, 182 (N.D. Ohio 1966); Comment, *The United States v. Janis—The Return of the "Silver Platter Doctrine"*, 12 New Eng. L. Rev. 789, 810-13 (1977); Note, *The Fourth Amendment and the Exclusionary Rule in Civil Cases*, 43 Den. L.J. 511, 515 (1966); Note, *Polishing the Tarnished Silver Platter Doctrine: The Effect of Janis v. United States on Intersovereign Fourth Amendment Violations*, 12 Tulsa L.J. 357, 378-79 (1976).

30. *See, e.g.*, *Romano v. Home Ins. Co.*, 490 F. Supp 191, 193 (N.D. Ga. 1980) (dictum); *United States v. One 1976 Cadillac Seville*, 477 F. Supp. 879, 883 (E.D. Mich. 1979); *Backos v. United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 16,350, at 85,936 (E.D. Mich. 1978); *Ekelund v. Secretary of Commerce*, 418 F. Supp. 102, 106 (E.D.N.Y. 1976); *Lamartiniere v. Department of Employment Sec.*, 372 So. 2d 690, 692-93 (La. App.), writ denied, 375 So. 2d 945 (La. 1979).

31. *See, e.g.*, *Vander Linden v. United States*, 502 F. Supp. 693, 697 (S.D. Iowa 1980); *Velasco v. IRS*, 80-2 U.S. Tax Cas. (CCH) ¶ 9590, at 84,924 (S.D.N.Y. 1980);

interpreting *Janis* find neither the identity of the sovereign nor the nature of the proceeding to be determinative. These courts opt instead for a case-by-case application of the balance of interests test, weighing the deterrent value of exclusion in a particular proceeding against the societal cost of exclusion.³²

The applicability of the exclusionary rule to subsequent civil proceedings is brought to issue in a wide variety of contexts.³³ For example, as in *Janis*, the IRS often seeks to use evidence seized in gambling or narcotics raids as a basis for an assessment of unpaid taxes.³⁴ Other government actions include narcotics addict commitment proceedings,³⁵ state professional disciplinary actions³⁶ and wardship proceedings.³⁷ Among the most common suits instituted by private litigants are personal injury actions,³⁸ insurance actions in which the insurer raises a defense of arson³⁹ and wrongful death actions in which a party seeks to introduce illegally obtained evidence on the issue of negligence.⁴⁰

The above examples are by no means exhaustive. Indeed, given the myriad of administrative actions that may be brought by state and federal agencies,⁴¹ and the increasing reliance in private actions upon

Gaston v. United States, 79-1 U.S. Tax Cas. (CCH) ¶ 9126, at 86,087 (N.D. Ga. 1978); *Guzzetta v. Commissioner*, 78 T.C. 173, 175 n.2 (1982).

32. See *supra* note 11.

33. State courts have wrestled with this issue for years. A number of cases are based primarily on state constitutional protections. See, e.g., *Carlisle v. State ex rel. Trammel*, 276 Ala. 436, 438, 163 So. 2d 596, 598 (1964); *Carson v. State ex rel. Price*, 221 Ga. 299, 303-04, 144 S.E.2d 384, 386-87 (1965); *Board of Selectmen v. Municipal Court*, 373 Mass. 783, 785-86, 369 N.E.2d 1145, 1146-47 (1977); *Kassner v. Fremont Mut. Ins. Co.*, 47 Mich. App. 264, 266-67, 209 N.W.2d 490, 492 (1973); *Lebel v. Swincicki*, 354 Mich. 427, 437-38, 93 N.W.2d 281, 285-86 (1958).

34. See, e.g., *Tirado v. Commissioner*, 689 F.2d 307, 309 (2d Cir. 1982); *Vander Linden v. United States*, 502 F. Supp. 693, 696-97 (S.D. Iowa 1980).

35. See, e.g., *People v. Winfrey*, 13 Cal. App. 3d 818, 92 Cal. Rptr. 33 (1970); *People v. Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968), *overruled on other grounds*, *People v. Thomas*, 19 Cal. 3d 630, 641 n.8, 566 P.2d 228, 234 n.8, 139 Cal. Rptr. 594, 600 n.8 (1977).

36. See, e.g., *Emslie v. State Bar*, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974); *People v. Harfmann*, 638 P.2d 745 (Colo. 1981).

37. See, e.g., *In re Christopher B.*, 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978); *In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976), *appeal dismissed sub nom.* *Potter v. Department of Social Servs.*, 431 U.S. 911 (1977).

38. See, e.g., *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175 (Hawaii Ct. App. 1981); *Herndon v. City of Ithaca*, 43 A.D.2d 634, 349 N.Y.S.2d 227 (1973) (mem.), *appeal dismissed*, 35 N.Y.2d 956, 324 N.E.2d 555, 365 N.Y.S.2d 176 (1974).

39. See, e.g., *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980); *Kassner v. Fremont Mut. Ins. Co.*, 47 Mich. App. 264, 209 N.W.2d 490 (1973).

40. See, e.g., *McNitt v. Citco Drilling Co.*, 397 Mich. 384, 245 N.W.2d 18 (1976); *Lebel v. Swincicki*, 354 Mich. 427, 93 N.W.2d 281 (1958).

41. See generally Note, *The Applicability of the Exclusionary Rule in Administrative Adjudicatory Proceedings*, 66 Iowa L. Rev. 343 (1981) (arguing that different

evidence seized by the government,⁴² the frequency with which this issue arises will only increase. Thus, there is a compelling need for a cogent, single test of admissibility.

II. THE VARIED INTERPRETATIONS OF *JANIS*

A. *The Purely Civil Versus Quasi-Criminal Test*

1. Constructing the Test

In the aftermath of *Janis*, characterizing the nature of the proceeding as either purely civil or quasi-criminal has become crucial to some courts.⁴³ This quasi-criminal/civil distinction has a history pre-dating *Janis*. Its roots may be found primarily in a 1965 Supreme Court decision, *One 1958 Plymouth Sedan v. Pennsylvania*.⁴⁴ In *Plymouth*, the Court extended the exclusionary rule to a civil forfeiture proceeding, reasoning that the proceeding, though civil in form, was criminal in substance.⁴⁵ *Plymouth*, in turn, relied heavily on a pre-exclusionary rule case, *Boyd v. United States*.⁴⁶ *Boyd* involved the compulsory production of a defendant's private papers in an action for the forfeiture of goods for failure to comply with import regulations.⁴⁷ The *Boyd* Court determined that the forfeiture proceeding was quasi-criminal in nature and held the admission of the illegally seized papers⁴⁸ to be within the fifth amendment proscription against compelling testimony.⁴⁹ Although *Boyd* was primarily a fifth amendment case, the

types of administrative proceedings should be treated differently for the purpose of the exclusionary rule) [hereinafter cited as *Administrative Proceedings*].

42. See, e.g., *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 344-48 (7th Cir.) (insurance suit), cert. denied, 421 U.S. 1011 (1975); *Romano v. Home Ins. Co.*, 490 F. Supp. 191, 193-94 (N.D. Ga. 1980) (same); *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175, 1180-81 (Hawaii Ct. App. 1981) (personal injury); *Lebel v. Swincicki*, 354 Mich. 427, 434-41, 93 N.W.2d 281, 284-88 (1958) (wrongful death); *Gilbert v. Leach*, 62 Mich. App. 722, 724-30, 233 N.W.2d 840, 842-45 (1975) (wrongful death), aff'd, 397 Mich. 384, 245 N.W.2d 18 (1976); *Herndon v. City of Ithaca*, 43 A.D.2d 634, 635-37, 349 N.Y.S.2d 227, 231 (personal injury), appeal dismissed, 35 N.Y.2d 956, 324 N.E.2d 555, 365 N.Y.S.2d 176 (1974).

43. See *supra* note 9 and accompanying text.

44. 380 U.S. 693 (1965).

45. *Id.* at 702-03.

46. 116 U.S. 616 (1886).

47. *Id.* at 617-18.

48. *Id.* at 633-35. The Court found that the issuance of the subpoena *duces tecum* constituted an unreasonable search and seizure under the fourth amendment. *Id.* at 634-35. This part of the Court's holding has been implicitly modified by subsequent cases, which have held some subpoenas not to be searches and seizures within the meaning of the amendment. See, e.g., *United States v. Miller*, 425 U.S. 435, 445-46 & n.8 (1976); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194-95 (1946).

49. 116 U.S. at 633-35.

quasi-criminal/civil distinction created therein has been invoked in many subsequent fourth amendment decisions.⁵⁰

By extending the rule to quasi-criminal actions, the *Plymouth* Court determined that the deterrent value of exclusion in quasi-criminal cases is substantial.⁵¹ Courts following this lead have excluded illegally seized evidence in all quasi-criminal cases,⁵² but have refused to consider applying the exclusionary rule to purely civil proceedings.⁵³

50. See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965) (forfeiture proceeding held quasi-criminal; extended the rule); *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir.) (action by insured against insurer held purely civil; refused to extend the rule), *cert. denied*, 421 U.S. 1011 (1975); *Romano v. Home Ins. Co.*, 490 F. Supp. 191, 193 (N.D. Ga. 1980) (dictum) (same); *United States v. One 1976 Cadillac Seville*, 477 F. Supp. 879, 883 (E.D. Mich. 1979) (forfeiture proceeding held quasi-criminal; extended the rule); *Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391, 407 (S.D. Iowa 1968) (antitrust suit held quasi-criminal; extended the rule), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); *United States v. Blank*, 261 F. Supp. 180, 183-84 (N.D. Ohio 1966) (enforcement of wagering excise tax provisions held quasi-criminal; extended the rule); *Rinderknecht v. Maricopa County Employees Merit Sys.*, 21 Ariz. App. 419, 421, 520 P.2d 332, 334-35 (employee disciplinary proceeding held quasi-criminal; extended the rule), *vacated after settlement*, 111 Ariz. 174, 526 P.2d 713 (1974); *Lamartiniere v. Department of Employment Sec.*, 372 So. 2d 690, 692-93 (La. Ct. App.) (unemployment compensation proceeding held purely civil; refused to extend the rule), *writ denied*, 375 So. 2d 945 (La. 1979).

51. The deterrence rationale made its appearance as early as *Wolf v. Colorado*, 338 U.S. 25, 31-32 (1949), *overruled*, *Mapp v. Ohio*, 367 U.S. 643 (1961). Thus, by the time the Supreme Court decided *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), the notion of deterring official misconduct pervaded Supreme Court opinions regarding extensions of the exclusionary rule. This concern was implicit in *Plymouth*, in which the Court was influenced by the close relationship between the civil forfeiture proceeding and the related criminal offense. The same evidence that the state was precluded from using in the criminal case served as the sole basis for the forfeiture. *Id.* at 697-701. The Court was concerned that if the rule was not extended to the proceeding in question, an opening would be left for abuse. See *id.* at 697. The state could forego a criminal prosecution and utilize the tainted evidence to pursue a civil forfeiture instead. In the case at bar, the civil penalty was in fact more onerous than the criminal punishment. *Id.* at 700-01. The Court concluded that "[i]t would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." *Id.* at 701.

52. See, e.g., *Iowa v. Union Asphalt & Road oils, Inc.*, 281 F. Supp. 391, 406-07 (S.D. Iowa 1968), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); *United States v. Blank*, 261 F. Supp. 180, 183-84 (N.D. Ohio 1966); *Rinderknecht v. Maricopa County Employees Merit Sys.*, 21 Ariz. App. 419, 422, 520 P.2d 332, 335, *vacated after settlement*, 111 Ariz. 174, 526 P.2d 713 (1974).

53. See, e.g., *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980)

Although a great many of the cases invoking the quasi-criminal/civil distinction are pre-*Janis*,⁵⁴ their precedential value appears undisturbed.⁵⁵ At least one court has specifically read *Janis* as reaffirming the *Plymouth* rule.⁵⁶ Other post-*Janis* decisions have indicated in dicta⁵⁷ a willingness to continue the *Plymouth* approach as the test in all civil suits. No doubt the nod toward the quasi-criminal classification made by both the *Janis* majority and Justice Stewart support the reading of *Janis* as preserving the viability of *Plymouth*.⁵⁸

Although the quasi-criminal/civil distinction is utilized most frequently in actions in which the government is a party,⁵⁹ it has by no

(dictum); *Lamartiniere v. Department of Employment Sec.*, 372 So. 2d 690 (La. Ct. App.), writ denied, 375 So. 2d 945 (La. 1979).

54. See, e.g., *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969); *Knoll Assocs. Inc. v. FTC*, 397 F.2d 530 (7th Cir. 1968); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), aff'd sub nom. as to exclusionary rule issue, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), aff'd as to attorney's fees issue, 409 F.2d 1239 (8th Cir. 1969); *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio 1966); *Lassoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962).

55. Some of these cases were cited without criticism by the *Janis* Court. *United States v. Janis*, 428 U.S. 433, 455 & n.30 (1976). Their continued validity may be inferred from the majority's distinction of *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), see 428 U.S. at 447 & n.17, and the dissent's argument that the tax provisions were sufficiently quasi-criminal within the meaning of *Plymouth*, id. at 460-64. Additionally, at least one Supreme Court decision since *Janis* has also acknowledged the rule's extension to quasi-criminal proceedings. See *United States v. Ward*, 448 U.S. 242, 255 (1980).

56. In *United States v. One 1976 Cadillac Seville*, 477 F. Supp. 879 (E.D. Mich. 1979), the court was forced to consider the continued validity of the *Plymouth* quasi-criminal exception in a civil forfeiture proceeding. An agent of the Drug Enforcement Administration searched a suspected drug courier and seized a pound of heroin. The seizure was found to be illegal and the evidence was suppressed in the government's criminal proceeding. Id. at 880. The government, nonetheless, pursued a civil forfeiture action against the vehicle involved in the incident, alleging that the vehicle had been used to facilitate the transportation of controlled substances. Probable cause for the forfeiture was based solely upon the illegally seized evidence. Id. at 880-81. While acknowledging the recent cutbacks in the application of the exclusionary rule, the court excluded the evidence, stating that the exclusionary rule still applies to "bar a forfeiture based on illegally obtained evidence." Id. at 883 (citations omitted). Significantly, the court relied on *Janis* as specifically reapproving *Plymouth*. Id.

57. See, e.g., *Savina Home Indus. v. Secretary of Labor*, 594 F.2d 1358, 1362 & n.6 (10th Cir. 1979); *Breen v. United States*, 82-1 U.S. Tax Cas. (CCH) ¶ 9132, at 83,108 (N.D. Ga. 1981).

58. 428 U.S. at 447 n.17, id. at 461-63 (Stewart, J., dissenting). (majority distinguished case at bar from quasi-criminal action in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), while Justice Stewart, dissenting, found the quasi-criminal classification to be applicable).

59. See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *United States v. One 1976 Cadillac Seville*, 477 F. Supp. 879 (E.D. Mich. 1979); *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio 1966); *Rinderknecht v. Mari-*

means been confined to government litigation. In private civil litigations, the use of the *Plymouth* rule is best exemplified by a pre-*Janis* case, *Honeycutt v. Aetna Insurance Co.*⁶⁰ In *Honeycutt*, the Seventh Circuit upheld the admission of illegally seized evidence in an action on a fire insurance policy brought by the insured.⁶¹ The insurer had introduced the evidence in support of a defense of arson. The court acknowledged the rule's applicability to quasi-criminal actions but reasoned that "[t]he rationale of *Boyd* itself seems to foreclose the applicability of the exclusionary rule to civil actions between private parties."⁶² Clearly, the court reasoned that an action between private parties could not be quasi-criminal. Since *Janis*, courts following *Honeycutt's* lead have similarly found the quasi-criminal/civil distinction persuasive in deciding whether to admit illegally seized evidence in private civil actions.⁶³

2. Misuse of *Boyd*

Viewing the quasi-criminal classification from a historical perspective, however, it is clear that courts should no longer blindly adhere to it in fourth amendment cases. Courts utilizing this approach rely heavily on *Boyd's* recognition of quasi-criminal actions. But the *Boyd* decision rests primarily on the constitutional prohibition of compelled testimony in criminal cases.⁶⁴ In that case, the compulsory production of private papers created a close intermingling of the fourth and fifth amendments.⁶⁵ This intermingling occurred because the single

copa County Employees Merit Sys., 21 Ariz. App. 419, 520 P.2d 332, *vacated after settlement*, 111 Ariz. 174, 526 P.2d 713 (1974).

60. 510 F.2d 340 (7th Cir.), *cert. denied*, 421 U.S. 1011 (1975).

61. *Id.* at 348.

62. *Id.*

63. *See, e.g.*, *Romano v. Home Ins. Co.*, 490 F. Supp. 191, 193 (N.D. Ga. 1980) (dictum); *Lamartiniere v. Department of Employment Sec.*, 372 So. 2d 690, 693-99 (La. Ct. App.), *writ denied*, 375 So. 2d 945 (La. 1979).

64. The *Janis* Court in fact cites *Boyd* only as a fifth amendment case. *See* 428 U.S. at 443. Justice Miller, in his concurring opinion in *Boyd*, argued that the case was a criminal one within the scope of the fifth amendment, but found no search and seizure. *Boyd v. United States*, 116 U.S. 616, 639 (1886) (Miller, J., concurring). The view taken by the *Boyd* majority opinion classifying the subpoena *duces tecum* as an unreasonable search and seizure has been undermined by subsequent cases. *See Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn. L. Rev. 379, 416-17 (1976). For a discussion of the current application of the fourth amendment to subpoenae *duces tecum*, see J.W. Hall, *Search and Seizure*, §§ 12:2-:5 (1982).

65. The *Boyd* Court relied heavily upon the close relationship between the two amendments. 116 U.S. at 633. In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), Justice Black maintained the position that the fourth amendment alone was insufficient to mandate the exclusion of evidence. He argued for exclusion when the two amendments intertwine or merge as in the *Boyd* case. *Id.* at 703-05 (Black, J., dissenting).

action—the forced production of self-incriminating documents—violated the fifth amendment, by compelling Boyd to testify against himself, as well as the fourth amendment, as an unreasonable seizure of evidence.⁶⁶ At the time *Boyd* was decided, the mere existence of a fourth amendment violation was insufficient to exclude evidence.⁶⁷ In contrast, the very language of the fifth amendment prohibits any person from being “compelled in any criminal case to be a witness against himself.”⁶⁸

The *Boyd* Court’s determination that the forfeiture was quasi-criminal was essential only to bring the case within the fifth amendment’s protection and thus exclude the evidence.⁶⁹ Further, even if a fourth amendment violation alone could have resulted in exclusion, it was not apparent then, as it is now, that the fourth amendment protects against government intrusions for civil purposes.⁷⁰ Courts that make the quasi-criminal/civil distinction are thus implicitly relying on a case that involved a unique set of facts and was decided in light of law that may not be entirely applicable today. Moreover, they fail to adequately address the primary purpose of the exclusionary rule, that of deterrence.

3. A Questionable Distinction

As the area of fourth amendment law continues to develop, the distinction between civil and quasi-criminal proceedings should be of diminishing importance in the fourth amendment area. The distinction rests on the outdated assumption that only criminal law enforcement officials conduct searches. Today many searches and seizures are conducted by administrative agencies.⁷¹ These administrative searches

66. 116 U.S. at 634-35. Today, however, lawfully compelling an individual to produce incriminating documents does not constitute a fifth amendment violation. See, e.g., *United States v. Ward*, 448 U.S. 242, 251-54 (1980); *Andresen v. Maryland*, 427 U.S. 463, 472 (1976).

67. Until *Weeks v. United States*, 232 U.S. 383 (1914), evidence illegally seized in violation of the fourth amendment was freely admissible in both federal and state courts under the common-law view that the method used to procure the evidence did not affect its admissibility. See *J.W. Hall*, *supra* note 64, § 20:2, at 577.

68. U.S. Const. amend. V.

69. See *United States v. Ward*, 448 U.S. 242, 251-53 (1980); *United States v. Janis*, 428 U.S. 433, 443 (1976); *Andresen v. Maryland*, 427 U.S. 463, 472 & n.6 (1976); *Clark*, *supra* note 64, at 414-17.

70. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court extended the fourth amendment warrant requirement to administrative searches of residential property. *Id.* at 534. The Court made it clear that the fourth amendment protections against government intrusions were not limited to persons suspected of criminal activity. *Id.* at 530-31. In *See v. City of Seattle*, 387 U.S. 541 (1967), the Court extended this protection to civil administrative searches of commercial properties as well. *Id.* at 545.

71. See *Administrative Proceedings*, *supra* note 41, at 358-59.

are unquestionably subject to the warrant requirement of the fourth amendment.⁷² Because the exclusionary rule is merely a judicially created tool to enforce compliance with the fourth amendment by deterring official misconduct, it should logically apply to these perhaps purely civil proceedings.

On a practical level, the *Plymouth* approach poses a considerable risk of collateral inquiry. Much time and energy is wasted in determining whether a particular proceeding is sufficiently penal in nature. This results in hair-splitting and uncertainty.⁷³ Officials may be allowed to profit from their own wrong simply because the court determines that the proceeding lacks sufficient indicia of a criminal action to warrant exclusion. Moreover, application of this approach to civil actions between private parties is inapposite; rarely will a court find such an action quasi-criminal in nature.⁷⁴

B. *The Intersovereign/Intrasovereign Test*

Some courts have interpreted the *Janis* opinion as implicitly endorsing an intrasovereign rule of exclusion.⁷⁵ Such courts place particular reliance upon the *Janis* Court's discussion of *Suarez v. Commissioner*.⁷⁶ *Suarez* presented a situation almost identical to that in *Janis*.⁷⁷ The *Suarez* court, though, chose to extend the exclusionary

72. See *Camara v. Municipal Court*, 387 U.S. 523 (1967). The *Camara* Court reasoned that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.* at 530 (footnote omitted). It must be noted, however, that administrative warrants may be issued on a showing of probable cause that is far less stringent than its counterpart for criminal searches. Administrative searches are governed by a standard of "reasonableness" and a warrant may issue upon a showing that "reasonable legislative or administrative standards for conducting an . . . inspection" have been met. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)); Hall, *supra* note 64, § 11.1, at 351-52; *id.* § 11.3, at 357.

73. Compare *Backos v. United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 16,350 (E.D. Mich. 1978) (wagering excise tax provisions not quasi-criminal) with *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio 1966) (wagering excise tax provisions are quasi-criminal).

74. One possibility is a private antitrust action. See *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969).

75. See, e.g., *Vander Linden v. United States*, 502 F. Supp. 693, 697 (S.D. Iowa 1980); *Velasco v. IRS*, 80-2 U.S. Tax Cas. (CCH) ¶ 9590, at 84,924 (S.D.N.Y. 1980); *Gaston v. United States*, 79-1 U.S. Tax Cas. (CCH) ¶ 9126, at 86,087 (N.D. Ga. 1978); *Guzzetta v. Commissioner*, 78 T.C. 173, 180-84 (1982).

76. 58 T.C. 792 (1972).

77. *Suarez*, like *Janis*, involved an intersovereign violation. *Id.* at 794-98. Evidence had been illegally seized by Florida police investigating illegal abortions at the defendant's clinic. *Id.* at 794. The IRS obtained the information after hearing of the raid from the news media. *Id.* at 798.

rule to a civil tax proceeding.⁷⁸ The *Janis* Court criticized *Suarez*, first on the ground that the court failed to focus on the deterrent purpose of the rule, and second, because “the court did not distinguish between intersovereign and intrasovereign uses of unconstitutionally seized materials.”⁷⁹ This and similar language in *Janis*, emphasizing this distinction,⁸⁰ has led some courts to apply the exclusionary rule only in cases of intrasovereign violations.

One of the most recent cases following this line of analysis is *Vander Linden v. United States*.⁸¹ In *Vander Linden*, one of the plaintiffs had turned over evidence to an IRS agent under the belief that it would be used for a civil tax audit.⁸² In fact, the agent’s purpose was to investigate “civil and/or criminal income tax charges based on unreported income from illegal drug activities and . . . to uncover drug-related activities.”⁸³ Because the plaintiff had been deceived as to the true purpose of the agent’s investigation, the consent to produce the evidence was deemed involuntary.⁸⁴ Accordingly, the evidence was suppressed at the criminal proceeding brought against him.⁸⁵

The IRS then used the evidence as a basis for an assessment.⁸⁶ The plaintiffs moved to suppress the evidence and to quash the tax assessments, the civil fraud penalties and the interest based thereon. Although characterizing the issue as unresolved, this court also suppressed the evidence in the civil proceeding,⁸⁷ finding “great guidance” in *Janis*.⁸⁸ Because of the intrasovereign violation presented, the court distinguished the facts in *Janis*.⁸⁹ The court relied on *Janis*’ recognition of a line of cases in which evidence was suppressed in intrasovereign situations.⁹⁰ Armed with these precedents, the *Vander Linden* court interpreted *Janis* as a determination that “the ‘deter-

78. *Id.* at 814.

79. *United States v. Janis*, 428 U.S. 433, 457 (1976).

80. *Id.* at 455-60. The Court also criticized *Janis*, the respondent, for failing to distinguish between cases involving intersovereign situations and intrasovereign situations. *Id.* at 455. The Court further noted that the “seminal” cases extending the rule involved intrasovereign violations. *Id.* at 456.

81. 502 F. Supp. 693 (S.D. Iowa 1980).

82. *Id.* at 694-95.

83. *Id.* at 695-96 (quoting *United States v. Vander Linden*, Cr. No. 76-29 (S.D. Iowa 1976)).

84. 502 F. Supp. at 696.

85. *Id.* at 694.

86. *Id.* at 696.

87. *Id.* at 698.

88. *Id.* at 697.

89. *Id.*

90. The following cases were among those cited without criticism by the *Janis* Court, 428 U.S. at 455 & n.30: *Pizzarello v. United States*, 408 F.2d 579, 585-86 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969); *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530, 535-37 (7th Cir. 1968); *Powell v. Zuckert*, 366 F.2d 634, 640-41 (D.C. Cir. 1966);

rent effect' [of the exclusionary rule] in an 'intrasovereign' situation would be furthered by excluding illegally obtained evidence in subsequent civil trial proceedings."⁹¹

As an analysis of *Janis*, however, this interpretation is questionable. Although the *Janis* Court did remark on the intersovereign nature of the violation in question,⁹² nothing in the opinion indicates that the Court intended this fact to be decisive. To the contrary, the Court's refusal to consider the exclusionary rule's applicability in the event of an intrasovereign use of evidence indicates that the identity of the sovereign was only one factor in determining the deterrent value of exclusion. Further, all the cases cited in *Janis* as having applied the rule to intrasovereign situations involved searches and seizures by officers of the same agency seeking to use the evidence in subsequent civil proceedings,⁹³ suggesting that the identity of the agency, and not the sovereign, was dispositive.

Additionally, the history of the exclusionary rule provides little basis for distinguishing between intrasovereign and intersovereign violations. Certainly under the outdated judicial integrity and personal right theories such a distinction would be irrelevant.⁹⁴ Even today,

Iowa v. Union Asphalt & Road oils, Inc., 281 F. Supp. 391, 407-08 (S.D. Iowa 1968), *aff'd sub nom. as to exclusionary rule issue*, Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); United States v. Blank, 261 F. Supp. 180, 182-84 (N.D. Ohio 1966); Lassoff v. Gray, 207 F. Supp. 843, 846-48 (W.D. Ky. 1962).

91. 502 F. Supp. at 697. Interestingly, the *Vander Linden* case was not only an intrasovereign situation, but one in which the very same division of the Internal Revenue Service committed the illegal search, and sought to use the evidence in both criminal and civil proceedings. *Id.* at 695-96.

92. See 428 U.S. at 455-58.

93. Pizzarello v. United States, 408 F.2d 579, 585-86 (2d Cir.) (evidence seized by IRS agents for purpose of criminal prosecution excluded in subsequent civil tax action), *cert. denied*, 396 U.S. 986 (1969); Knoll Assocs., Inc. v. FTC, 397 F.2d 530, 535-36 (7th Cir. 1968) (evidence seized at the behest of the Federal Trade Commission (FTC) excluded in FTC hearing on discriminatory practices); Powell v. Zuckert, 366 F.2d 634, 639-41 (D.C. Cir. 1966) (evidence seized by the United States Air Force and Japanese police excluded in Air Force employee's discharge hearing); Iowa v. Union Asphalt & Road oils, Inc., 281 F. Supp. 391, 407-08 (S.D. Iowa 1968) (evidence seized by state attorney general ostensibly for purpose of consumer fraud prosecution suppressed in civil antitrust action brought by state attorney general), *aff'd sub nom. as to exclusionary rule issue*, Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969); United States v. Blank, 261 F. Supp. 180, 182 (N.D. Ohio 1966) (evidence seized by IRS suppressed in civil tax proceeding).

94. Under both the personal right and judicial integrity theories it is clear that the evidence could not be introduced against the search victim whether the violation was intersovereign or intrasovereign. In an opinion that best exemplified these theories, Justice Holmes declared that "[t]he essence of a provision forbidding the acquisi-

under the deterrence rationale, the argument for such a distinction is substantially weakened by the existence of an intersovereign ban on illegally seized evidence in criminal prosecutions.⁹⁵ Rather than concentrating on the identity of the sovereign, the ban focuses on the demonstrable common interest of law enforcement officials in criminal prosecutions.⁹⁶

As a practical matter, an approach that relies upon an inter/intra-sovereign distinction is easy to apply in subsequent civil proceedings. But its analysis is superficial and in some instances bears little rational relationship to effectuating the goal of deterrence. The test errs by failing to focus its attention on the identity and interests of the seizing officer. Thus, it tends to be overbroad and may result in the unnecessary exclusion of concededly relevant and reliable evidence.

Moreover, it may allow agents of one sovereign to benefit from illegal seizures by agents of another sovereign, merely because the search victim fails to present sufficient evidence of a formal, cooperative arrangement between the two agencies.⁹⁷ This test ignores the

tion of evidence in a certain way is . . . not merely [that the] evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

95. The use of evidence illegally seized by state officials in the federal courts, known as the "silver platter doctrine," was banned by the Supreme Court in *Elkins v. United States*, 364 U.S. 206, 208 (1960), *overruling*, *Lustig v. United States*, 338 U.S. 74 (1949). The term "silver platter doctrine" originated in Justice Frankfurter's plurality opinion in *Lustig*: "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." 338 U.S. at 78-79.

96. In creating the intersovereign ban in criminal prosecutions, the Court had determined that the seizing officials and the officials seeking to use the evidence, both criminal law enforcement agents, have a demonstrable interest in the criminal prosecution. This link in itself is sufficiently probative of a substantial deterrent effect to warrant exclusion of the evidence. *United States v. Janis*, 428 U.S. 433, 457-58 (1976); *see Elkins v. United States*, 364 U.S. 206, 222 (1960).

97. Whether this level of proof is necessary remains unclear. The *Janis* decision, however, implies that proof of a formal agreement between the agencies or actual participation in the illegal search by the proponent of the evidence may be required. The Court rendered its decision based on the assumption that there was no "federal participation" in the illegal search or agreement between the parties. 428 U.S. at 455 & n.31. Notably, in making this statement the *Janis* Court cited to two early decisions, *id.* at 455 n.31, *Lustig v. United States*, 338 U.S. 74 (1949), *overruled*, *Elkins v. United States*, 364 U.S. 206 (1960) and *Byars v. United States*, 273 U.S. 28 (1927). Both cases formulated rules for defining "federal participation" during the years when the "silver platter doctrine" remained in force. In *Byars*, a federal agent was asked to participate in the actual search, *id.* at 32-33, and in *Lustig*, the federal agent, while not participating throughout the entire search, joined the state officials before the search was actually concluded and "share[d] in the critical examination of the uncovered articles as the physical search proceeded," 338 U.S. at 78. It can also be inferred from the *Janis* decision that a formal agreement imposing a duty or

many instances of intersovereign cooperation, and also assumes, rather naively given the nature of bureaucracies, that all agents of the same sovereign have the same goals and thus, "stick together."⁹⁸ Moreover, by the very nature of this test, it is inapplicable to actions brought by private parties. Thus, it is deficient because it fails to provide any guidance for the ever-growing use of illegally seized evidence in private cases.

C. *The Balance Of Interests Approach*

In *United States v. Calandra*,⁹⁹ the Supreme Court laid the groundwork for contemporary exclusionary rule analysis by stating that the "prime purpose [of the rule] is to deter future unlawful police conduct."¹⁰⁰ *Calandra* restricted the rule's application to "those areas where its remedial objectives are . . . most efficaciously served."¹⁰¹ These areas are determined by balancing, as the *Janis* Court did,¹⁰² the deterrent value of exclusion against the potential harm of losing relevant evidence.¹⁰³

A number of federal and state courts applying the balance of interests formula have refrained from placing undue weight on either the nature of the proceeding or on the identity of the sovereign.¹⁰⁴ Instead, these courts have considered all the relevant factors presented and have applied the balance on a case-by-case basis. Some factors that have tipped the balance in favor of admitting illegally seized

responsibility upon the seizing agent to turn the evidence over to the proponent of the evidence is required. See 428 U.S. at 455. This interpretation is consistent with the result in *Guzzetta v. Commissioner*, 78 T.C. 173 (1982), in which the court denied exclusion of illegally seized evidence in a civil tax proceeding, even though the existence of a secret, though informal, liaison between the two agencies was proven. 78 T.C. at 174. The liaison relationship was established before the search was conducted. The purpose of this liaison was "to establish a vehicle for [the IRS] to obtain information relevant to potential tax crimes," but the New York Police Department transferred files on suspects to the IRS at its discretion. *Id.*

98. The existence of intrasovereign bureaucratic rivalry has been recognized. *Tirado v. Commissioner*, 689 F.2d 307, 313 (2d Cir. 1982). Just as clear are many instances of intersovereign cooperation. See *Vander Linden v. United States*, 502 F. Supp. 693, 694-96 (S.D. Iowa 1980). In *Vander Linden*, the IRS participated in an intersovereign multi-agency drug law enforcement program. *Id.* at 694-95.

99. 414 U.S. 338 (1974).

100. *Id.* at 347.

101. *Id.* at 348.

102. *United States v. Janis*, 428 U.S. 433, 453-54 (1976).

103. 414 U.S. at 349.

104. See, e.g., *Jonas v. City of Atlanta*, 647 F.2d 580, 587 (5th Cir. 1981); *Emslie v. State Bar*, 11 Cal. 3d 210, 227-29, 520 P.2d 991, 1001-02, 113 Cal. Rptr. 175, 184-85 (1974); *Governing Bd. v. Metcalf*, 36 Cal. App. 3d 546, 549-50, 111 Cal. Rptr. 724, 726 (1974); *People v. Harfmann*, 638 P.2d 745, 748 (Colo. 1981).

evidence in civil cases are the merely technical nature of the violation,¹⁰⁵ the need to protect children from morally unfit teachers¹⁰⁶ and parents,¹⁰⁷ and the duty to protect the public from unscrupulous lawyers.¹⁰⁸ Factors that have militated in favor of exclusion include the highly prejudicial effect of the evidence in a personal injury action¹⁰⁹ and outrageous police conduct.¹¹⁰

While these courts correctly refuse to make any one factor determinative, their application of the *Calandra* balance of interests test may lead to inconsistent and sometimes inequitable results. The case-by-case approach had its genesis in *Calandra*, a case that considered extending the exclusionary rule to grand jury proceedings.¹¹¹ The Court balanced the potential injury to the role and functions of a grand jury against the deterrent effect of excluding the evidence.¹¹² Determining that the important societal functions served by grand jury proceedings outweighed the marginal additional deterrent effect of excluding the evidence, the Court refused to extend the rule.¹¹³

Calandra's balance, however, is incomplete. It fails to provide guidelines for determining the potential deterrent effect. Rather than assessing the degree of deterrence with any certainty, the *Calandra* Court merely assumed that "[a]ny incremental deterrent effect which might be achieved . . . is uncertain at best."¹¹⁴ The Court was justified in assuming at least some deterrence on the facts presented. A grand jury proceeding is an essential step in the prosecutorial process for which evidence is seized.¹¹⁵ Because the seizing officers intended

105. See *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976).

106. See *Governing Bd. v. Metcalf*, 36 Cal. App. 3d 546, 550-51, 111 Cal. Rptr. 724, 727 (1974).

107. See *In re Christopher B.*, 82 Cal. App. 3d 608, 614-15, 147 Cal. Rptr. 390, 394 (1978).

108. *People v. Harfmann*, 638 P.2d 745, 747 (Colo. 1981).

109. *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175, 1181 (Hawaii Ct. App. 1981).

110. See *People ex rel. Difanis v. Boston*, 92 Ill. App. 3d 962, 966-67, 416 N.E.2d 333, 337 (1981).

111. *United States v. Calandra*, 414 U.S. 338, 339 (1974).

112. *Id.* at 347-49.

113. *Id.* at 351-55.

114. *Id.* at 351.

115. The presentation of evidence to a grand jury is a necessary step in many criminal prosecutions. Grand jury proceedings are, with certain exceptions, constitutionally required in federal prosecutions for felonies. U.S. Const. amend. V; M. Frankel & G. Naftales, *The Grand Jury* 3 (1975). In some states presentation to a grand jury is required for all felonies. Other states require grand jury proceedings only for crimes punishable by death or life imprisonment. In the remaining states, the prosecutor may seek either a grand jury indictment or file an information. *Id.* at 16.

that the evidence be used throughout the entire process, the Court had some basis for determining the existence of a deterrent effect.¹¹⁶

Similarly, whenever evidence is seized specifically for use in a particular civil proceeding,¹¹⁷ the connection between the search and the contemplated use is sufficiently direct to assume that deterrence will result from exclusion. Thus, in such cases, applying the *Calandra* balance is sufficient. A court can adequately weigh the justifiably assumed deterrence against the potential harm of losing relevant evidence.

When the evidence is apparently seized for a purpose other than the subsequent civil proceeding, however, the connection between the seizing official and the contemplated use is not as easily discernible. Therefore, the existence of any deterrence should not be presumed. Without an accurate assessment of the potential deterrent effect, application of the *Calandra* balancing formula is meaningless. Courts may summarily dismiss the potential deterrent effect as marginal or nonexistent, not as a result of serious inquiry, but because of general skepticism about the rule's deterrent value.¹¹⁸ With such unregulated freedom, a court may predetermine the outcome of the balancing process merely by manipulating the weight on the deterrence end of the scale. Understandably, the temptation to manipulate may be particularly great when the object of the proceeding creates sympathy.¹¹⁹ Thus, before the *Calandra* balancing formula can become

116. Since the presentation of facts to a grand jury is often a necessary step in many criminal prosecutions, see *supra* note 115 and accompanying text, it is reasonable to assume that officers who seize evidence with the hope that it will be used in the successful prosecution of individuals for particular crimes are equally interested in the admission of the evidence before the grand jury. The *Calandra* Court did not find that police officers lacked any incentive to conduct illegal searches for the purpose of a grand jury. Rather, the Court found that the incentive is "substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." 414 U.S. at 351.

117. See, e.g., *Wong Chung Che v. Immigration & Naturalization Serv.*, 565 F.2d 166, 168-69 (1st Cir. 1977); *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530, 533-34 (7th Cir. 1968); *Smyth v. Lubbers*, 398 F. Supp. 777, 786-87 (W.D. Mich. 1975); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 405-06 (S.D. Iowa 1968), *aff'd sub nom. as to exclusionary rule issue*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969), *aff'd as to attorney's fees issue*, 409 F.2d 1239 (8th Cir. 1969).

118. This skepticism is evident from the majority opinion in *Janis*. In its discussion of the deterrence end of the balance, the Court devoted a full eight pages to a general discussion of its dissatisfaction with the exclusionary rule and the lack of empirical data showing the rule to be an effective deterrent. The discussion of the facts of the case at bar was minimal. 428 U.S. at 447-54.

119. The danger is particularly great when, for example, the object of the proceeding is to protect children from unfit teachers or parents. See, e.g., *In re Christopher B.*, 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978) (unfit parents); *Governing Bd. v. Metcalf*, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974) (unfit teachers).

effective, guidelines are essential to ensure an accurate assessment of the deterrent effect.

III. A PROPOSED SOLUTION: THE *TIRADO* APPROACH

The Second Circuit, in *Tirado v. Commissioner*,¹²⁰ provided the element necessary to adapt the *Calandra* balance of interests test to subsequent civil actions. It set forth guidelines for determining the deterrent effect of excluding evidence in a particular proceeding by focusing on the motives of the officials who seized the challenged evidence.¹²¹

In *Tirado*, five members of a joint federal and state law enforcement task force searched Tirado's apartment pursuant to a warrant.¹²² In addition to narcotics, the agents uncovered evidence that indicated that Tirado had undisclosed sources of income.¹²³ The narcotics seized served as a basis for Tirado's subsequent conviction in a state court.¹²⁴ Shortly after the search, the seizing agents provided the IRS with the evidence which enabled it to make a deficiency determination.¹²⁵ Tirado petitioned the Tax Court for redetermination of the deficiency, claiming that the items seized were beyond the scope of the warrant and should have been excluded.¹²⁶ The Tax Court concluded that the warrant encompassed the items seized and refused to exclude the evidence.¹²⁷

The Second Circuit, however, in affirming the decision of the Tax Court, did not reach the issue of the legality of the search. Instead, it held that the exclusionary rule was inapplicable to the subsequent civil proceeding.¹²⁸ Notably, the court was faced with an intrasovereign situation and was therefore required to answer the question specifically left open by *Janis*.¹²⁹

The court rejected the argument that the deterrent effect of exclusion is directly related to the identity of the sovereign.¹³⁰ The court also rejected as unrelated to the issue of deterrence the view that the exclusionary rule is per se inapplicable to civil proceedings.¹³¹ Rather,

120. 689 F.2d 307 (2d Cir. 1982).

121. *Id.* at 310.

122. *Id.* at 308.

123. *Id.* at 308-09.

124. *Id.*

125. *Id.* at 309.

126. *Id.*

127. *Id.*

128. *Id.*

129. Federal narcotics agents participated in the search and the IRS later sought to use the evidence. *Id.* at 308-09.

130. *Id.* at 313.

131. *Id.* at 313-14.

the court utilized the *Calandra* balance of interest approach,¹³² and further, formulated specific guidelines for its application.

According to the Second Circuit, determining whether exclusion enhances deterrence requires an assessment of the seizing officers' motives.¹³³ The court stated that an "inquiry into the officers' motivation is the fundamental issue in translating the idea of deterrence into practical decisions, for deterrence means modifying individual behavior."¹³⁴ To effectuate this translation, the court utilized a two-step process.

First, the court considered the "relationship between the [seizing agents' official] responsibilities and expertise . . . and the . . . proceeding at which the seized material [was] being offered."¹³⁵ This inquiry provides a general assumption about the seizing officials' likely motivation. A court may infer the efficacy of a deterrent sanction from the jurisdictional scope of the officials' agency. This step neatly confines the rule's applicability to those proceedings that are closely related to the official purpose of the search. More importantly, this step injects a measure of objectivity into a very subjective and undefined portion of the *Calandra* balancing formula. Applying this step to the facts in *Tirado*, the court found that the civil tax proceeding was "too remote" from the seizing agents' "zone of primary interest" to believe that suppression would serve the deterrent purpose of the rule.¹³⁶ The court noted that the collection of taxes is generally not a motivating factor for narcotics agents.¹³⁷

Recognizing, however, that a mere examination of agents' official duties may be insufficient to determine fully the value of exclusion, the court extended the analysis.¹³⁸ In a second step, the court considered any evidence of actual collusion between the seizing officials and the proponent of the evidence in the subsequent civil proceeding.¹³⁹ This step adds a necessary subjective component, permitting a court to consider specific facts that refute the general assumption about the agents' motives. Hence, a court may delve beneath the surface determination to explore the possibility of actual improper motive or collusion. Evidence of a formal or informal agreement, a liaison relationship or a general policy of cooperation is relevant to this inquiry. In *Tirado*, the court found no specific facts tending to show formal or informal cooperation between the agencies.¹⁴⁰ Accordingly, the court

132. *See id.* at 310.

133. *Id.*

134. *Id.*

135. *Id.* at 311.

136. *Id.* at 314.

137. *Id.*

138. *Id.* at 312.

139. *Id.*

140. *Id.* at 314-15.

concluded that the general expectation concerning the motivation of the agents as found in the first step had not been undermined.¹⁴¹

By analyzing the seizing officials' motivation, this two-step process provides a full and accurate framework for assessing potential deterrence. Once assessed, the deterrent effect can be more accurately weighed in the *Calandra* balance. This avoids the possibility of either underestimating the deterrent effect or overemphasizing the injury to society. The opportunity to employ this approach will arise most often in civil actions in which the government is a party. Indeed, more than one agency frequently benefits from the fruits of an illegal search. This is demonstrated by the many instances in which the IRS has based assessments on evidence seized during narcotics and gambling investigations.¹⁴²

Use of *Tirado* in private civil litigation, although less likely, is not unforeseeable. Concededly, government agents do not typically base their decision to carry out potentially illegal searches on whether the evidence could be used in private civil litigation. Occasionally, however, exclusion in a private civil litigation may yield a deterrent effect. Such situations might arise when there is a customary symbiotic relationship between government and private investigators.¹⁴³

Additionally, the *Tirado* approach is clearly superior to the inflexible application of the quasi-criminal¹⁴⁴ or intrasovereign exceptions.¹⁴⁵ It is far more equitable in its recognition that effective deterrence of unlawful searches may exist beyond the criminal or quasi-criminal context. It correctly focuses on the relationship of the official to the proceeding as the crucial factor, rather than the nature of the proceeding itself. Further, this approach considers the many instances of intrasovereign bureaucratic rivalry and intersovereign cooperation.¹⁴⁶ Thus, by focusing on the realities of law enforcement, it furthers the deterrent purpose of the rule by excluding evidence in appropriate

141. *Id.*

142. See, e.g., *United States v. Janis*, 428 U.S. 433, 436-37 (1976); *Tirado v. Commissioner*, 689 F.2d 307, 315 (2d Cir. 1982); *Velasco v. IRS*, 80-2 U.S. Tax Cas. (CCH) ¶ 9590, at 84,924 (S.D.N.Y. 1980); *Estate of McDonald v. United States*, 79-1 U.S. Tax Cas. (CCH) ¶ 9182, at 86,293 (N.D. Cal. 1979); *Gaston v. United States*, 79-1 U.S. Tax Cas. (CCH) ¶ 9126, at 86,087 (N.D. Ga. 1978); *Backos v. United States*, 80-2 U.S. Tax Cas. (CCH) ¶ 16,350, at 85,937-38 (E.D. Mich. 1978); *Guzetta v. Commissioner*, 78 T.C. 173, 174 (1982).

143. It has been suggested that such a symbiotic relationship exists between police and fire officials and insurance company investigators with regard to possible arson cases. See Denenberg & Gordon, *The Exclusionary Rule in Civil Litigation: Sifting Through the Ashes of Michigan v. Tyler*, 47 *Ins. Couns. J.* 375, 380 (1980). These commentators went so far as to advise insurance companies to conduct independent investigations to avoid the possible taint of illegal seizures. *Id.* at 382.

144. See *supra* pt. II(A).

145. See *supra* pt. II(B).

146. See *supra* note 98.

intersovereign situations. Moreover, it avoids the unnecessary exclusion of relevant evidence created by an intrasovereign rule of exclusion.

CONCLUSION

The applicability of the exclusionary rule to subsequent civil proceedings presents a complex legal issue. Courts that focus solely on either the nature of the proceeding or the identity of the sovereign fail to address adequately the primary function of the exclusionary rule—deterrence. A meaningful application of the *Calandra* balance of interests test to this situation requires an accurate assessment of the potential deterrent effect to be derived from exclusion.

The two-step analysis introduced in *Tirado v. Commissioner* provides the requisite accuracy by delving into the seizing officials' motives for conducting the search, on both objective and subjective levels. Once assessed, the potential deterrent effect can be more meaningfully weighed against the societal loss that would result from exclusion. Moreover, the flexibility of this two-step inquiry enhances its usefulness in the growing number of private, diverse civil lawsuits in which the issue arises.

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