

Toward a New Regulation on the Exclusionary Rule. What Can Mexico Learn from American and Canadian Experiences?

Paola Iliana **de la Rosa Rodríguez**

 <https://orcid.org/0000-0001-6620-3589>

Universidad Autónoma de San Luis Potosí. México

E-mail address: paola.delarosa@uaslp.mx

Anthony P. **LaRose**

 <https://orcid.org/0009-0006-9566-8282>

University of Tampa, Florida. United States

E-mail address: alarose@ut.edu

Received: October 21st, 2024

Accepted: March 19th, 2025

DOI: <https://doi.org/10.22201/ijj.24485306e.2025.1.19606>

Abstract: For over a century, U.S. debate surrounding the Exclusionary Rule has centered on questions such as if it inevitably allows criminals to go free, if the victims suffer due to police misconduct, or if the rule's scope has narrowed over time. The rule's primary objective has been to deter police misconduct. In Canada, discussions have focused on the necessity of conducting a discretionary analysis to determine the admissibility of unconstitutionally obtained evidence, especially since Canada's Charter of Rights and Freedoms publication in 1982. Mexico's debate on the issue began in 2008, and its version of the rule aims to guarantee more rights for the accused; however, it remains subject to legal interpretation and hasn't been able to effectively reduce police misconduct. This article provides a brief comparison of the Exclusionary Rule's-related regulation in the three neighboring countries. It suggests that Mexico should consider its northern neighbors common law legal history and pursue substantive changes to the National Criminal Procedures Code. These should directly address illegal evidence's prohibition and any exceptions to the rule that may exist.

Keywords: admissibility of evidence; exclusionary rule; exceptions to exclusionary rule; illegal evidence; police illegality; suppress evidence.

Resumen: Durante más de un siglo, el debate en Estados Unidos en torno a la Regla de Exclusión se ha centrado en cuestiones como si inevitablemente permite que los delincuentes queden en libertad, si las víctimas sufren debido a la mala con-

ducta policial o incluso si el ámbito de aplicación de la norma se ha reducido con el tiempo. En cualquier caso, el objetivo principal de la norma ha sido disuadir de la mala conducta policial. En Canadá, por su parte, los debates se han centrado en la necesidad de realizar un análisis discrecional para determinar la admisibilidad de las pruebas obtenidas inconstitucionalmente, especialmente desde la publicación de la Carta Canadiense de los Derechos y Libertades en 1982. Por último, en México el debate sobre la cuestión comenzó en 2008, y su versión de la norma pretende garantizar más derechos a los acusados; sin embargo, sigue estando sujeta a interpretación jurídica y no ha logrado reducir eficazmente la mala conducta policial. Este estudio ofrece una breve comparación de la regulación de la Regla de Exclusión en los tres países vecinos. Sugiere que México debería tener en cuenta la historia jurídica del derecho consuetudinario de sus vecinos del norte y realizar cambios sustantivos en el Código Nacional de Procedimientos Penales. Estas deberían abordar directamente la prohibición de las pruebas ilícitas y las excepciones a la regla que puedan existir.

Palabras clave: admisión de pruebas; reglas de exclusión; excepciones a la prueba ilícita; prueba ilícita; ilegalidad policial; no admisión de pruebas.

Summary: I. *Introduction.* II. *Methodology.* III. *The Exclusionary Rule in the U.S. and Canada.* IV. *Exceptions to the Exclusionary Rule.* V. *The Exclusionary Rule in Mexico.* VI. *Summary and Conclusions.* VII. *References.*

I. Introduction

Since its inception, the Exclusionary Rule (ER) has been among the most controversial and widely debated legal doctrines in American common law. This debate has not been limited to the United States, persisting in Canada and, more recently, in Mexico. Rooted in the Fourth Amendment of the U.S. Constitution—which guarantees the “right of the people to be free from unreasonable searches and seizures”—, the ER was first established in *Weeks v. United States*, 232 U.S. 383 (1914). For over a century, it has been a cornerstone of jurisprudence in North America’s common law systems in the U.S. and Canada. An early precursor to the ER appeared in *Boyd v. United States*, 116 U.S. 616 (1886), where the Court excluded evidence obtained through a police demand for private documents, deeming it an unreasonable search and seizure. The Court further reasoned that such an action amounted to compelling self-incriminating testimony, reinforcing the rule’s foundational principles.

Since then, the ER has evolved into a judicial mechanism that limits government overreach, safeguards privacy rights, upholds the integrity of the courts, and deters unconstitutional police conduct by “throwing out” illegally obtained evidence. Courts have traditionally justified this rule by emphasizing the need to prevent tainted evidence from undermining the judiciary’s reputation and preserving what Justice Stevens termed “the imperative of judicial integrity”.¹ Matthew Kim expands on this view, suggesting that the ER not only protects ju-

¹ See *Elkins v. United States*, 364 U.S. 206, 222 (1960)

dicial integrity, but strengthens it, at least in the United States.² Similarly, Bloom describes it as “the major remedy in the United States for addressing a police illegality”.³ Other scholars, including Correa,⁴ Bloom, Fentin and Smith,⁵ and Orfield⁶ have echoed this perspective, highlighting the ER’s role as a substantive deterrent against police misconduct in the US.

The Exclusionary Rule has faced vocal critics on both sides of the 49th Parallel. Generally, they argue that the rule has no clear basis in the Fourth Amendment, does little to deter police misconduct (e.g., offering neither guidance on respecting constitutional rights nor incentives for internal discipline) and may encourage further wrongdoing, such as additional violations to ensure tainted evidenced is admitted in court. No one embodied these criticisms more famously than U.S. Federal Appeals Judge Malcolm Wilkey, who even nicknamed the rule as “irrational”. He blamed it for rising crime rates—in a nation, as he quipped, where a criminal “can parade in the streets with a submachine gun in a blanket under his arm”—,⁷ as well as for undermining police accountability, and at times, incentivizing even more egregious misconduct. After a century of jurisprudential debate, the issue remains unresolved in its country of origin.

On the other hand, the evolution of the Exclusionary Rule in Canada followed a very different path from that of its southern neighbor, though it ultimately reached a similar outcome. Rather than allowing the rule to develop solely through judicial precedent, Canada proactively included it in the Canadian Charter of Rights and Freedoms (henceforth, the Charter), enacted in 1982. Mirroring the U.S. Fourth Amendment, the Charter guarantees that “[e]veryone has a right to be secure against unreasonable search and seizure” and explicitly mandates the exclusion of evidence if its admission “would bring the administration of justice into disrepute”. Beyond this, the Charter also enshrines other protections, including due process rights, safeguards against unlawful searches or seizures, the right to counsel, and prohibitions on cruel and unusual punishments. Before the Charter, however, Canadian courts largely favored admitting evidence as long as it was “relevant, probative and reliable”.⁸

² Matthew D. Kim, *The Exclusionary Rule and Judicial Integrity: An Empirical Study of Public Perceptions of the Exclusionary Rule*, 87 MO. L. REV. (2023).

³ Robert Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AMERICAN JOURNAL OF CRIMINAL LAW, NO. 079, 79-104 (1992).

⁴ Carlos Correa Robles, *La función de la exclusión de la prueba ilícita en el proceso penal y sus consecuencias: un estudio comparado*, 16 POLÍTICA CRIMINAL 32, 644-677 (2021).

⁵ Robert Smith, *Herring v. United States: The Continued Erosion of the Exclusionary Rule*, 61 MERCER LAW REVIEW, NO. 2, ARTICLE 9 (2010).

⁶ Myron Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 THE UNIVERSITY OF CHICAGO LAW REVIEW 3, 1016-1069 (1987).

⁷ Malcolm Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JOURNAL JUDICATURE 5, 214-232 (1978).

⁸ Eileen Skinnider, *Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada*, INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY 6, 1-26 (2005).

The most famous and relevant is section 24(2), which states: “Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute” (Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11).

However, this does not mean that judicial review has not played a key role in shaping the Exclusionary Rule in Canada. In fact, courts are partly expected to help remedy violations of individual liberties since⁹ the Supreme Court established guidelines for lower courts when assessing evidence admissibility. In *Collins v. The Queen*, 1 S. C. R 265 (1987) the Court emphasized that judges must consider excluding evidence if it undermines trial fairness, and that they should also take into account the seriousness of the Charter violation (e.g., a “good faith” error being less severe than an avoidable breach), and the potential harm to the judiciary’s reputation.¹⁰

It is important to bear in mind that Canada is a common law nation whose legal system operates on precedent. While it has taken significant legislative steps to address the inclusion or exclusion of evidence (such as amending the Charter of Rights and Freedoms through the well-known section 24(2)), case law remains predominant, as legislative bodies have been unable to establish a clear consensus. As noted by Skinnider, “whether and in what circumstances courts should exclude illegally or improperly obtained evidence is one of the most hotly contested questions in criminal procedure and evidence law”.¹¹ Similarly, Osborn affirms¹² that in Canada illegally obtained evidence is excluded only when its prejudicial effect outweighs its probative value, or when it is either irrelevant or unreliable, an approach Mexico should consider.

While the norm is said to be “American Made, Canadian Approved”, the past 15 years have seen a growing debate in Mexico regarding the Exclusionary Rule. After centuries of civil law tradition and inquisitorial process, the country has adopted certain common law legal principles, including the adversarial system. Under significant U.S. political and economic pressure, Mexico underwent a dramatic shift, prioritizing not only the rights of the accused but also the protection of victim’s rights. State authorities are now obligated to uphold the presumption of innocence, due process, the right to legal counsel, and the prohibition of self-incrimination.

⁹ James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 BOSTON COLLEGE INTERNATIONAL AND CORPORATIVE L. REV. 1, 77-140 (1999).

¹⁰ Stribopoulos, *supra* note 9, at 122-124.

¹¹ Skinnider, *supra* note 8.

¹² Debra Osborn, *Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia*, 1 ELAW JOURNAL, MURDOCH UNIVERSITY ELECTRONIC JOURNAL 44, (2000).

However, alongside the positive changes, the adoption of the adversarial system has raised concern among citizens, legal professionals and scholars. Key issues include the potential for guilty parties to go free, insufficient measures to curb police corruption, and challenges in safeguarding the integrity of the criminal justice process. Now, fifteen years into the transition, Mexico's legal community continues to grapple with balancing the rights of the accused against those of victims, including questions of reparations and compensation.

This article's central question is whether Mexico should formally incorporate the North American version of the Exclusionary Rule (along with its exceptions), into its written legislation. Given that Mexico's decision to reform its centuries old legal traditions was partly influenced by its northern neighbor, the analysis focuses on the path taken by the U.S. and Canada —rather than other legal systems like Spain—, since both nations have struggled with this issue extensively in their courts and legislatures. We argue that Mexico should avoid letting “history repeat itself” by waiting for courts to legislate through judicial fiat, as occurred in the U.S. Instead, it should confront the issue directly with comprehensive legislation and, if possible, a constitutional amendment, one that is even more progressive than the Canadian Charter. Additionally, the legislature should proactively codify exceptions to the Exclusionary Rule while providing clear guidelines and training for law enforcement and judges on its implementation.

We believe Mexico is likely to follow the path traced by its northern neighbors. First, no country exerts more political pressure —formal or informal— on Mexico than the U.S. In fact, Mexico's ongoing transition to an adversarial legal system is largely driven by U.S. mandates tied to American financial support. As a result, like most Latin American countries, Mexico's Criminal Procedures Code already establishes an adversarial system blending elements of traditional civil law and American-inspired common law.

Second, the geographical proximity of the U.S. and Canada, along with long-established treaties, trade ties and/or cultural exchanges, makes them natural reference points —much as France might look to Italy for legal guidance rather than overseas. Finally, both the U.S. and Canada have operated under the adversarial system for generations, developing a robust legal framework that Mexico could leverage to its advantage.

II. Methodology

This analysis is based on a review of the most relevant judicial precedents from the United States and Canada, in addition to legislative frameworks in Mexico. These selected cases focused on the obtention of illegal evidence, a key element in any investigation. For the Mexican case, the analysis covers constitutional standards, applicable criminal laws, and jurisprudential criteria. Moreover, key factors influencing the application of the Exclusionary Rule—including trial

fairness, judicial integrity, police misconduct, prosecution, and suppression motions—are examined. Through an analysis of suppression motion frequency, persecution rejection rates, and their potential systemic impact, this research evaluates whether these rules safeguard or undermine the criminal justice system. Additionally, we include a comprehensive literature review of noteworthy academic articles on illegal evidence in the United States, Canada, and Mexico.

III. The Exclusionary Rule in the U.S. and Canada

The history of the Exclusionary Rule goes back to the second decade of the twentieth century. However, its foundational precedent emerged earlier in *Boyd v. United States*, 116 U.S. 616 (1886), when the Supreme Court linked the Fourth and Fifth Amendments. In this landmark ruling, the Court held that compelling a defendant to produce private documents constituted an unconstitutional search and seizure protections to obtain self-incriminating evidence, such conduct also breached the Fifth Amendment’s safeguards against compelled testimony.

This was later solidified in the landmark case of *Weeks v. United States*, 232 U.S. 383 (1914) where the Supreme Court specifically established the necessity of excluding illegally obtained evidence. The court emphasized that this exclusion served not merely to deter unconstitutional conduct by authorities, but to safeguard judicial integrity. In its ruling, the Court rejected the admission of private documents seized by federal law officers without a warrant. This made the U.S., according to Craig Bradley, the first nation to exclude probative evidence from the court process in order to protect citizens from government infringement on individual rights.

The Warren court would later apply these protections to the state jurisdictions via *Mapp v. Ohio*, 367 U.S. 643 (1961), explicitly citing constitutional safeguards against illegally obtained evidence. The decision prioritized both the importance of preserving judicial integrity and the necessity of deterring government misconduct, particularly by police enforcement. In *Mapp*, the court excluded “lewd and lascivious” materials found during an unlawful warrantless search for a bombing suspect despite their prohibited status under Ohio law. Additionally, the Court overturned part of its prior decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), which had previously held that the exclusionary rule did not apply to state proceedings.

Even with a more clearly defined exclusionary rule under the Canadian Charter, the issue has remained a subject of debate and judicial review in Canada. Unsurprisingly, Canadian courts have developed extensive case law on the matter, sparking significant controversy. It is worth noting that Canada’s adherence to the exclusionary rule stems, at least in part, from international

law¹³ and a longstanding commitment for human rights —not merely deference to American common law precedent. Ultimately, however, Canadian jurisprudence leans more heavily on the Charter and domestic legal precedent as it seeks to balance the rights of the accused against the society’s interests` in punishing criminal offenders. As former Canadian Justice Lamer articulated in *R. v. Hogan*,¹⁴ this involves weighing the “social interest in the particular case and against the gravity or character of the invasion”. Before the Charter, Canadian courts almost invariably favored admitting “relevant” evidence regardless of how it was obtained. However, in recent decades, they have also acknowledged the need to curb police misconduct and uphold judicial integrity by excluding evidence obtained through rights violations, most notably through “Collins framework”.

In 1987, the Supreme Court of Canada first interpreted section “24(2)” — the provision governing the exclusion of evidence — in the case of *Ruby Collins*, who had been forcibly detained by the Royal Canadian Mounted Police (RCMP) and found in possession of a small balloon filled with heroin. Collins argued that the warrantless search violated section 8 of the Charter, which guarantees freedom from unreasonable searches and seizures. Overturning lower courts, Canada’s high court emphasized that judges must assess “all of the circumstances” (similar to the American “totality of the circumstances” test) when deciding whether to exclude the evidence. Key considerations include the nature of the evidence, the severity of the state violation (i.e. technical error versus deliberate misconduct), and the availability of alternative means to obtain the evidence.

Skinninger notes that the ultimate result was a three-part guide for lower courts to consider 1) how admitting the evidence would affect trial fairness, 2) factors to assess when evaluating the seriousness of the Charter violation, and 3) whether admitting the evidence would bring the judicial system into disrepute. While this “Collins Framework” provided the initial guidance, courts in the following years generally distinguished between types of evidence, favoring the admissibility of real evidence, (e.g., a murder weapon) while dismissing self-incriminating evidence (e.g., confession). However, this did not mean Canadian common law would not continue evolving on the issue.¹⁵

A decade later in *R. V. Stillman*, 1 S.C.R. 607. (1997), the Supreme Court of Canada offered further guidance by distinguishing between “descriptive” and “non-descriptive” evidence. Descriptive evidence — such as evidence obtained without “compelling cooperation” — was not subject to protection, while non-descriptive evidence, —where the accused was compelled to participate in the “creation or discovery of the evidence,” as with the hair samples, buccal swabs and teeth impressions in this case — was deemed inadmissible regardless of its

¹³ International Covenant on Civil and Political Rights, 1976

¹⁴ See *R. v. Hogan*, 2 U.S. 574, 595 (1975).

¹⁵ Skinner, *supra* note 8.

probative nature. However, this dichotomy didn't last. In 2009, the court revisited the issue in *R. v. Grant*, [2009] 2 S.C.R. 353, abandoning the *Collins framework* in favor of a “fresh look” at the exclusion of evidence under section 24 (2) of the Charter.

In *Grant*, the Supreme Court of Canada, recognizing the ambiguity of earlier rulings and the resulting challenges in applying them consistently, established “three avenues of inquiry” to be assessed from a long-term, forward-looking, and societal perspective”. The court revisited and revised the “Collins test”, raising the standard for excluding evidence. The case involved Donahue Grant, a young Black man, who was walking on a sidewalk in a location police deemed considered to be a high-crime area, when he was approached by several officers, including two plainclothes detectives. Driving past Grant, the detectives claimed he “stared” at them and was acting suspiciously by fidgeting in his pants and jacket. Along with a uniformed officer who intentionally blocked Grant's path, the three officers confronted him. According to the police, Grant acted “suspiciously”, and he was asked to keep his hands visible while he was questioned as to whether he was carrying anything he should not. He admitted that he was carrying a firearm and a small quantity of marijuana. He was then read his rights and arrested.

At trial, Grant claimed the stop and arrest violated his rights under multiple sections of the Canadian Charter of Rights and Freedoms and sought to have the evidence excluded. However, the trial judge disagreed and admitted the pistol as evidence, resulting in Grant's conviction on several firearms offences. Grant appealed, but the appeals court upheld the decision, ruling that while the detention was “arbitrary”, and breached section 9 of the Charter, the evidence remained admissible under section 24(2). The Supreme Court later confirmed this ruling, concluding that while the stop was arbitrary, it was not “sufficiently egregious” to exclude the evidence, and the weapons convictions were upheld.

Thus, when balancing the effect of admitting evidence against protecting individual rights and upholding the integrity of the justice system, courts must consider three key factors: (1) the seriousness of the state conduct that violated the Charter (as admitting the evidence could signal judicial tolerance of serious state misconduct), (2) the extent to which the breach undermined the accused's Charter-protected interests (since admission might devalue individual rights); and (3) society's interest in resolving the case on its merits (para. 71). Additionally, the court confirmed that judges must consider the totality of the circumstances surrounding the evidence's acquisition and determine whether its admission would bring “the administration of justice into disrepute” (para. 71) (*R v Grant*, 2 SCC 32, 2 SCR 353 (2009)).

In short, the court ruled that while sections 8 and 9 of the Charter had been violated, the breach was not severe enough to justify excluding the evidence, as doing so would not “bring the administration of justice into disrepute”. *Grant* marked a significant shift in the court's approach— moving from balancing

the rights of the accused against those of victims, to weighing individual rights against the government's (and by extension, the court's) reputation.

Still, the court's "broad societal test"¹⁶ effort did not settle the issue, and, unsurprisingly, Canada's courts have since faced numerous exclusionary rule cases, with the Grant's guidelines remaining "the subject of significant consideration and commentary".¹⁷ Ultimately, despite a considerable "head start" (including a century of American jurisprudence in the area) a well-written Charter, and almost fifty years of case law, Canada's legal debate over the exclusionary rule remains unresolved.

1. The Constable Blundered

The central criticism of the Exclusionary Rule is that it has, does, and will continue to release guilty individuals simply because "the constable blundered", as U.S. Supreme Court Justice Benjamin Cardozo famously put it. Critics argue that countless factually guilty defendants may evade justice due to police errors made in "good faith".¹⁸ However, time has shown that this concern is unfounded. Evidence is successfully suppressed in very few cases, perhaps less than 1% of felony prosecutions.¹⁹ Moreover, as Davies notes the vast majority of cases are settled before trial, often before any challenges to admission of evidence are even raised.²⁰

Additionally, as McDonald explained in 2018, when the police misconduct is unintentional, excluding evidence does little to deter future violations. Consequently, Fourth Amendment violations stemming from police ignorance, carelessness, or even sheer incompetence have rarely led to evidence being excluded.

In his comprehensive study, Peter F. Nardulli found that motions to suppress physical evidence were filed in fewer than 5% of the 7,500 cases reviewed — and succeeded only 0.69% of the time. His analysis revealed similarly low success rates for "serious" motions to exclude identifications and confessions, with suppression motions yielding comparable results.²¹ Furthermore, he points out that even where evidence was excluded, it did not necessarily lead to an acquittal or charges being dropped. In fact, "In all, only 46 cases —less than 0.6% of the cases studied— were lost because of the three exclusionary rules combined,

¹⁶ Wayne Gorman, *The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada*, 54 COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION 1, 113 (2018).

¹⁷ Gorman, *supra* note 16, at 114.

¹⁸ Matthew Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, GEORGETOWN LAW JOURNAL 546, 1-57 (2023).

¹⁹ REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 14 (1979).

²⁰ Thomas Davies, A Hard Look at What We Know and Still Need to Learn About the Costs of the Exclusionary Rule, USA, AMERICAN BAR ASSOCIATION 611 (1983).

²¹ PETER NARDULLI, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 3, 585-609 (1983).

most of them involving offenses that would have incurred less than six months' imprisonment or first offenders".²²

In a recent study, Liu and Nir found that few cases face evidentiary challenges, and even among those, only 13% result in exclusion of any evidence. They also note that judges predominantly sided with the police, especially in cases lacking corroborating facts (e.g., no video evidence). Therefore, they conclude that the motion to suppress hearings are not an effective deterrent against police misconduct.²³ Moreover, evidence suppressions occur in only 0.69% of all cases dismissed due to illegally seized evidence. Prosecutors reject just 0.8% of felony arrests because of illegal searches, and the rate is slightly higher for drug cases, at 2.4%.

In similar research, Craig Uchida and Timothy Bynum found comparable results: motions to suppress evidence were granted for only two percent of cases, and defendants who were "set free" typically faced charges involving minor drug possession or petty theft.²⁴ Furthermore, another recent study by Esther Nir, which included cases where motions to suppress were dropped prior to a hearing, revealed a slightly higher success rate (6%) for the defense.²⁵ These findings suggest that raising exclusionary rule concerns has little to no effect on allowing criminals, especially those accused of felonies or violent crimes, to evade conviction.

As we can see, rejection rates in both the U.S. and Canada are relatively low, and the inclusion of the Exclusionary Rule has not compromised public safety or led to an evolving door of crime. In the U.S., the debate has shifted towards allowing erosion of the Rule, with growing acceptance of such evidence in certain cases.

2. Does Not Reduce Corruption

The second major criticism is that the exclusionary rule has little to no effect on deterring police misconduct. Thomas K. Clancy²⁶ addressed the lack of empirical data to either confirm or refute its effectiveness in preventing 4th Amendment violations. While no comprehensive database tracks instances of police planting or illegally obtaining evidence, the extremely low number of case dis-

²² NARDULLI, *supra* note 21, at 585.

²³ Liu Siyu & Esther Nir, *Mission Impossible? Challenging Police Credibility in Suppression Motions*, 33 CRIMINAL JUSTICE POLICY REV. 6, 584–607 (2021).

²⁴ CRAIG UCHIDA & TIMOTHY BYNUM, EFFECTS OF "UNITED STATES VS. LEON" ON POLICE SEARCH WARRANT PRACTICES, (1984-1985, Stanford libraries). <https://www.icpsr.umich.edu/web/NAICJD/studies/9348>

²⁵ Esther Nir, *Empowering the Exclusionary Rule: Using Suppression Motion Data to Improve Police Searches and Searches in the United States*, 22 INTERNATIONAL JOURNAL OF POLICE SCIENCE & MANAGEMENT 1, 96–107 (2020). <https://doi.org/10.1177/1461355719888945> Last consulted February 10th, 2025.

²⁶ Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. OF CRIM. L., May 12th, 2012, at 357.

missals and the rarity of serious disciplinary actions against officers each year strongly supports this conclusion.

In fact, some argue that the ER may even encourage constitutional violations, particularly when outdated case law and statutes are used to justify modern police practices.²⁷ Also, the suppression of evidence does not guarantee a dismissal or acquittal, as remaining evidence may still lead to a conviction. Critics also emphasize that the ER offers little direct relief for the innocent individuals whose Fourth Amendment rights have been violated by law enforcement. Even so, proponents would likely agree that the Exclusionary Rule, if properly applied, serves as a safeguard for all —guilty and innocent alike— against future constitutional violations (assuming police adhere to judicial rulings that curb their discretion).

In Canada, Lauren Gowler has highlighted the limitations of the Charter of Rights and Freedoms in deterring police corruption and misconduct, questioning whether officers are genuinely held accountable for violations. Then, by addressing police powers on an ad hoc basis (e.g., numerous lower court rulings) the judiciary has failed to establish clear precedents limiting police authority. Consequently, Gowler advocates for a more proactive legislative role in defining police powers and implementing stronger safeguards, including new laws and Charter amendments, to prevent abuses.

If the exclusionary rule, as currently interpreted by the courts, enforced by police themselves, and overseen by government prosecutors reluctant to bring criminal charges against officers in the U.S. and Canada, does not significantly reduce police corruption, it certainly will not do so in Mexico.

3. Civil Torts and Police Qualified Immunity

Evidently, civil torts have also proven ineffective in deterring police misconduct. Lawsuits against police are difficult to win, and —aside from a few notable exceptions—, rarely lead to substantial penalties. Moreover, they fail to hold individual officers personally accountable, as any monetary judgments are typically passed on to taxpayers or an insurance company. Interestingly, the cases that influenced the drafting of the Fourth Amendment were not English criminal cases, but rather tort claims in which victims sought damages for violations of their lawful rights.²⁸

In the past year, particularly since the death of George Floyd, there has been significant debate over reforming this system, including proposals to eliminate qualified immunity, which often shields police and other public employees from liability for actions taken “under the color of law”, even in cases that may

²⁷ Matthew Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, UNIVERSITY OF UTAH COLLEGE OF LAW RESEARCH PAPER No. 546 (2023).

²⁸ Richard Posner, *Rethinking the Fourth Amendment*, 49 THE SUPREME COURT REVIEW, 49-80 (1981).

appear to be civil rights violations. Some have also suggested requiring officers to carry individual liability insurance, at least in the U.S. However, Joanna Schwartz notes, “eliminating qualified immunity would not significantly alter the scope of constitutional protections, dramatically increase plaintiffs’ success rates, or transform government practices that currently dampen the effects of lawsuits on officers’ and officials’ decision-making.” Given these limitations, Mexico’s legislature would likely need to enact tailored regulations to address these concerns effectively.²⁹

IV. Exceptions to the Exclusionary Rule

The development of exceptions to the Exclusionary Rule under common law has also been controversial. While a full discussion falls outside the scope of this article, the following provides a summary of these exceptions. Broadly speaking, evidence obtained in good faith is not excluded, for instance, when police reasonably rely on a search warrant that is later deemed invalid. As established in *Stone v. Powell* (cited by Brown);³⁰ along with Halpern³¹ and Correa,³² courts may allow evidence obtained by government agents who acted under reasonable, although mistaken, belief that their search or seizure was lawful.

The doctrine of inevitable discovery allows evidence obtained through an unlawful search or seizure to be admitted in court, provided it would have been unavoidably discovered through an independent, legal investigation. For example, in *Brewer v. Williams*, 430 U.S. 387 (1977) cited by Kamisar³³ and Brooks,³⁴ the court admitted illegally obtained evidence —Williams’ incriminating statements that led the police to the victim’s body— reasoning that the body would have been found eventually, even without the unlawful interrogation. Similarly, in *Nix v. Williams* (referred by Kaczynski³⁵ and Fishkin³⁶), the Court reaffirmed that evidence remains admissible if it would inevitably have been uncovered through lawful police procedures. Similarly, In *Murray v. Unit-*

²⁹ Joanna Schwartz, *After Qualified Immunity*, 120 COLUMBIA LAW REVIEW 2, 309–388 (2020).

³⁰ John Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655. (1982).

³¹ Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1 (1982).

³² Correa, *supra* note 4. At 644-677.

³³ Yale Kamisar, *Brewer v. Williams, Massiah and Miranda, What Is ‘Interrogation’-When Does It Matter*, 67 GEO. L.J. 1 (1978).

³⁴ Peter Brooks, *Inevitable Discovery-Law, Narrative, Retrospectivity*, YALE J. OF LAW AND THE HUMANITIES, 2013, in 71.

³⁵ Stephen Kaczynski, *Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule*, ARMY LAW, 1(1984).

³⁶ James Fishkin, *Nix v. Williams, An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 IOWA L. REV 1369 (1984).

ed States (referenced by Graveline³⁷ and Fee³⁸), the Supreme Court broadened the independent source doctrine, permitting evidence initially discovered during an illegal police entry to be admitted because it was later secured through a valid warrant, independent of the initial illegality.

The attenuation exception to the ER allows evidence obtained through government misconduct to be admissible if the connection between the misconduct and the discovery of the evidence is sufficiently weak. For example, in *Wong Sun v. U.S.*,³⁹ a narcotics case, the defendant's confession followed an unconstitutional arrest. The police initially found heroin in possession of Way, who then led them to Toy. After an illegal entry, Toy implicated Johnny as a drug seller, and at Johnny's premises, he further implicated Wong Sun. Johnny and Toy were arrested, and the police compelled Toy to take them to Wong Sun's house. Though no narcotics were found, Wong Sun was arrested. While the Court of Appeals ruled that the arrests and evidence obtained without warrants violated the Fourth Amendment, it held that certain items of proof were not direct products of the illegal arrests and were therefore admissible.

When evidence is challenged but the unconstitutional conduct is deemed too remote from the original police misconduct (i.e., attenuated) it may still be admissible.³⁹ The independent source doctrine permits the use of evidence initially obtained unlawfully, such as through an illegal search, if it is later acquired through constitutionally valid means. Additionally, the government may sometimes introduce illegally gathered evidence (impeachment evidence) not to prove guilt but to challenge the credibility of a defense witness. Finally, qualified immunity shields police officers from civil lawsuits—often a defendant's only recourse for a rights violation (i.e., illegal search)—unless the officer acted entirely outside the scope of their lawful duties.

For over a century, America's common law courts have stirred controversy by carving out numerous exceptions to the Exclusionary Rule, such as the “good faith exception”. The U.S. Supreme Court's ruling in *Silverthorne Lumber Co. v. United States*,⁴⁰ began weakening the ER declaring that illegally obtained evidence “become sacred and inaccessible”—this exception is now known as the “independent source” doctrine. Over time, courts have interpreted additional exceptions, leading many to argue that these represent a steady, albeit slow erosion of Fourth Amendment protections. Critics of the ER, as Stribopoulos points out, often dismiss its role in preserving judicial integrity.⁴¹ Carolyn Yagla goes further, asserting that “the Exclusionary Rule has evolved from a

³⁷ Bradley Graveline, *Fourth Amendment—An Acceptable Erosion of the Exclusionary Rule*, 79 J. CRIM. L. & CRIMINOLOGY 647 (1988).

³⁸ Edwin Fee, Jr., *Criminal Procedure I: Narrowing the Protection of the Fourth Amendment*, ANN. SURV. AM. L. 371. (1989)

³⁹ See *Nardone v. United States*, 308 U.S. 338, 341 (1939)

⁴⁰ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920))

⁴¹ James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 BOSTON COLLEGE INTERNATIONAL AND CORPORATIVE L. REV. 1, 77-140 (1999).

constitutional right to its present interpretation as a judicial remedy applicable only when it will advance the goal of deterrence”.⁴² We argue that Mexico should not emulate this approach. Instead, legislative action, rather than relying solely on judges, is necessary to protect the accused and effectively deter police misconduct.

In Canada, while the Charter has not relied as exclusively on case law for specific exceptions, the Supreme Court has still been called to interpret its provisions and provide some guidance for lower court judges. Historically, pre-Charter Canada left the determination of evidence’s probative value—and thus its admissibility—largely to the discretion of individual judges. This has resulted in a legal framework that generally favors admissibility over exclusion. Moreover, Canadian scholarship on the ER tends to prioritize safeguarding the judiciary from “disrepute” rather than focusing primarily on deterring police misconduct or protecting individual rights. As Robert Harvie observes, while stemming police misconduct may be a benefit that results from the ER, “the purpose of section 24(2) is to prevent the administration of justice from being brought into *further* [italics added] disrepute by the admission of the evidence at trial”.⁴³ Thus, Mexico may require a legislative, rather than a judicial, approach to effectively address police corruption and rights violations.

V. The Exclusionary Rule in Mexico

Unlike its northern neighbors, Mexico’s Exclusionary Rule is not a product of judicial interpretation but is explicitly enshrined in the Federal Constitution and in the National Criminal Procedures Code. Further, protection against the use of illegally obtained evidence (known as “*prueba ilícita*”) is recognized as a human right and is as one of the key tools of court officials to protect the rights of the accused.⁴⁴ As in the U.S., however, it is also viewed as an important safeguard of judicial integrity, since judges are expected to disregard illegally obtained evidence when determining guilt or innocence.

Additionally, a key purpose of the exclusionary rule in Mexico was to reduce illegal practices during detentions and criminal investigations.⁴⁵ Unlike in Canada and the U.S., Mexico’s ER is not considered to be a remedy for the personal “harm” suffered by the individuals subjected to an unlawful arrest or searches. In other words, it is *not* designed to deter police misconduct or correct unconstitutional practices by law enforcement. As Salas Calero notes, most police offi-

⁴² Carolyn Yagla, *The Good Faith Exception to the Exclusionary Rule: The Latest Example of “New Federalism” in the States*, 71 MARQUETTE L. REV. 1, 15 (1987).

⁴³ Robert Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE L. J. 4, 798 (1992).

⁴⁴ MIGUEL ANAYA & PAOLA DE LA ROSA, LA PRUEBA ILÍCITA, SUS PREMISAS, REGULACIÓN Y EXCEPCIONES EN EL SISTEMA PENAL ACUSATORIO 116 (México: Flores Editor y Distribuidor, 2017)

⁴⁵ ERIK PEREZ LOYO, LA PRUEBA ILÍCITA (México: Flores Editor y Distribuidor, 2022).

cers are poorly informed about the rule's application or its exceptions, and there is minimal accountability for illegally obtained evidence.⁴⁶ Furthermore, the lack of professionalism in police work has led to a high number of due process violation complaints filed with Mexican human rights organizations.

It is evident that Mexico's ER not only shares origins with the U.S., but also mirrors its expectations and growing pains. Now that Mexico has adopted a common law legal process, it will likely face the same centuries-long struggle of legal precedents to achieve the desired balance. However, we argue that this ought not be necessarily the case. Mexico can "predict the future" by examine the evolution of the Exclusionary Rule in the U.S. and Canada, using their histories to craft a *legislative remedy* more aligned with the Canadian Charter of Rights and Freedoms. Rather than waiting decades to achieve a fragmented judicial review, we suggest a more substantive legal reform in the National Criminal Procedures Code, one that clearly defines protections from the outset.

While the exclusionary rule inevitably means some criminals may go free, history in the U.S. and Canada suggests that this number is minimal (e.g., less than 1% at the U.S. federal level) and typically applies only to relatively minor cases. We argue that the more pressing concern is the need to curb police misconduct and strengthen public trust in the criminal justice system. Furthermore, fears about "cartel members evading justice" —a significant issue in Mexico— could be mitigated by incorporating a "crime seriousness test" into the law. This would involve a legislatively codified directive instructing judges to weigh the admissibility of evidence based on the gravity of the offense and, where relevant, its ties to particularly dangerous Drug Trafficking Organizations.

While this article cannot fully address all the legal, political and social objections to the ER, several key criticisms have persisted in both the U.S. and Canada. Opponents argue that the rule allows the guilty to go free and fails to assist innocent victims of police misconduct when no illegally obtained (or planted) evidence exists. Additionally, critics contend that it provides, at best, a *minimal* deterrence against police misconduct and may even incentivize further corruption, such as perjury. Lastly, existing tort remedies have proven inadequate in deterring police violations. Our broader argument is that these criticisms have endured for decades in both the U.S. and Canada, *and* strikingly similar objections have emerged in contemporary Mexico. The next section briefly addresses each of these issues.

1. Concerns about the Exclusionary Rule in Mexico

In Mexico, Congress serves as the primary source of law. Article 20 of the Federal Mexican Constitution establishes that any evidence obtained in violation

⁴⁶ Luis Calero, *Aspectos materiales y procesales del principio acusatorio: problemas probatorios, prueba ilícita y procesos penales socialmente relevantes. La exclusión de pruebas ilícitamente obtenidas en el Derecho Procesal de los Estados Unidos*, 66 REVISTA DEL PODER JUDICIAL, 367-401 (2002).

of human rights is considered inadmissible. This principle is further reinforced by the National Criminal Procedures Code: Article 263 requires that evidence must be obtained, produced, and reproduced in a lawful manner, while Article 357 declares evidence invalid if it has been obtained through human rights violations or not properly incorporated under the law. Additionally, Article 346 mandates the exclusion of evidence that has been illegally obtained. Together, these provisions reflect a strong legislative commitment to addressing concerns regarding improperly obtained evidence, as neither the Mexican Constitution nor the National Criminal Procedures Code permits exceptions to the exclusionary rule.

The second source of law in the Mexican legal system is jurisprudence, a term referring to binding legal precedents.⁴⁷ Judicially created laws play a secondary role, since the publication of court opinions remains limited, especially at the local level. According to the Mexican High Courts of Justice (*Tribunales Superiores de Justicia*), excluding illegally obtained evidence is a key practice that upholds and protects due process. Their judicial interpretations have established that evidence directly or indirectly gathered in violation of human rights is inadmissible, and will have no effect.⁴⁸ They have further ruled that the right to due process encompasses the right *not* to be convicted based on evidence obtained outside the constitutional and legal standards.⁴⁹ Another interpretation regarding the exclusion of illegal evidence states that any statement declared by the accused without the legal counsel must be excluded as unlawful and holds no value.⁵⁰ The prohibition of illegal evidence serves as a safeguard for defendants in criminal proceedings, ensuring that their rights are protected. It also means that the fundamental formalities of the procedure must be respected as a condition for any criminal conviction.

Another main concern of including the Exclusionary Rule in Mexican law was that it would lead to more acquittals of guilty defendants (due to excluded evidence), but, in contrast, would reduce police corruption. However, neither of these expectations has materialized. For instance, a study published in 2023 revealed that in the State of Mexico (*Estado de México*), prosecutors typically did not seek the exclusion of evidence because the defense presented none for consideration.⁵¹ In Baja California, the Public Prosecutor's Office moved to exclude evidence in two cases where the defense did submit proof, but the judge

⁴⁷ José Serna, *The Concept of Jurisprudencia in Mexican Law*. 1 MEXICAN LAW REVIEW, NO.2 5 (2009).

⁴⁸ Tesis: CLXII/2011, Semanario Judicial de la Federación y su Gaceta, Novena Época, t. XXXIV, agosto de 2011, p. 226. Registro 161221.

⁴⁹ Tesis 139/2011, Semanario Judicial de la Federación y su Gaceta, Décima Época, t.3, diciembre de 2011, p. 2057. Registro: 160509

⁵⁰ Tesis: 1a./J. 35/2015 (10a.), Gaceta del Semanario Judicial de la Federación, Primera Sala, Décima Época, t. 1. libro 18, mayo de 2015, p. 302. Registro número 2009008.

⁵¹ USAID, OBSERVATORIOS DE AUDIENCIAS Y RESOLUCIONES JUDICIALES. ESTADO DE MÉXICO Y BAJA CALIFORNIA (2023).

denied both requests.⁵² Furthermore, courtroom discussions during hearings rarely resulted in evidence being excluded.

The lack of penalties for crime in Mexico is evidently a top concern for citizens. Recent studies indicate that public concern over impunity more than doubled between 2012 and 2018.⁵³ A few months after the Exclusionary Rule was first codified in the Mexican Constitution, the Mexican newspaper *Reforma* revealed that only 1% of crimes committed resulted in punishment, which contributed to the low crime reporting rate. Nevertheless, this near-total lack of accountability is not due to the result of the exclusion of evidence in courts. According to a 2019 report by the Institute for Economics and Peace, only 7 % of the crimes were investigated and less than 3 percent led to convictions, resulting in an impunity rate of 97%.⁵⁴

This phenomenon occurs primarily because crimes go unreported. According to the study, the main reason people avoid reporting crimes is lack of trust in authorities (16%).⁵⁵ Other contributing factors include lengthy legal processes, insufficient evidence, the perception that minor crimes are not worth reporting, fear of retaliation (especially among assault victims), concerns about extortions, and the hostile attitude of officials.⁵⁶ Most citizens in Mexico believe filing charges is a waste of time and victims generally doubt the authorities' ability to investigate crimes. Very few criminals face consequences, since cases are rarely pursued, arrests are infrequent, and prosecutions are even rarer.

Research from the U.S.⁵⁷ suggest that roughly 1% of cases involve evidence being excluded due to the exclusionary rule. Applying this to the Mexican context, where only 3% of crimes are reported, means the rule would affect less than 1% of that already small fraction. Ultimately, this amounts to a mere 0.03% of total criminal activity.⁵⁸ Additionally, public trust in the police has remained consistently low in Mexico. The following chart, sourced from the National Survey of Victimization and Perception of Public Safety (ENVIPE),⁵⁹ displays the percentage of crimes reported in Mexico between 2012 and 2019.

⁵² USAID, *supra* note 50.

⁵³ Jose Luengo & Tessa Butler, *Impunity in Mexico: A Rising Concern*, JUSTICE IN MEXICO, (MAY, 2018), <https://justiceinmexico.org/impunity-mexico-rising-concern/>

⁵⁴ INSTITUTE FOR ECONOMICS AND PEACE, ÍNDICE DE PAZ 2 (México 2019). <https://www.economicsandpeace.org/wp-content/uploads/2020/08/Mexico-Peace-Index-2019-Spanish.pdf>

⁵⁵ INSTITUTE FOR ECONOMICS AND PEACE, *supra* note 54 at 62.

⁵⁶ Marien Rivera & Rafael Chávez, *Presentan cifras de inseguridad en México*, 1 NÚMEROS ROJOS DEL SISTEMA PENAL 1, 1-17 (2011).

⁵⁷ Mike Lavin, *The Impact of the Exclusionary Rule Upon the Montana Criminal Justice System*, United States, NATIONAL INSTITUTE OF JUSTICE (1984) <https://www.bjs.gov/content/pub/pdf/ierumcjs.pdf>

⁵⁸ BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE. <https://www.bjs.gov/content/pub/pdf/ierumcjs.pdf>

⁵⁹ INEGI, Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública (ENVIPE) (2024).

Table 1. Victimization and Perception of Public Safety Based on INEGI (ENVIPE, 2024)

2012	12.2%
2013	9.9%
2014	10.7%
2015	10.5%
2016	9.7%
2017	10.4%
2018	10.6%
2019	11.0%
2020	10.1%
2021	10.1%
2022	10.9%
2023	10.4%

The Exclusionary Rule, in its current form, has proven largely ineffective in curbing police corruption. According to the 2021 National Survey of Persons Deprived of Liberty (ENPOL),⁶⁰ 52.8% of the detainees reported experiencing psychological violence while held in police stations or Public Prosecutor’s Office. Criminal investigation authorities continue to employ torture and other forms of ill-treatment to extract incriminatory evidence during investigations.⁶¹ Many respondents reported experiencing unlawful violence in their interrogations following detention. ENPOL reported that 75% of surveyed individuals claimed to have endured some type of “psychological violence” during arrest, including abuses such as forced nudity or suffocation. Nearly 64% reported physical assaults, such as kicking, punching, crushing injuries, and electric shocks. Furthermore, the survey revealed that 72% of the detained faced torture during custody and 61% experienced mistreatment in the prosecutor’s office.

In 2019, the World Justice Project⁶² revealed that the torture and ill-treatment in Mexico are most likely to occur before trial, particularly during inspections of individuals and private premises, detainee interrogations, and suspects line-ups. Testimonies from arrested individuals further indicate that violence is more prevalent during criminal investigations than in prisons. Unfortunately, as Jasso & Jasso point out, violent interactions between police and civilians re-

⁶⁰ ENPOL, Encuesta Nacional de Población Privada de la Libertad (2021).

⁶¹ PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1045 (Oxford University Press, 2013).

⁶² WORLD JUSTICE PROJECT, ÍNDICE DE ESTADO DE DERECHO EN MÉXICO 2019-2020 (2020).

main a widespread and persistent issue across Latin America.⁶³ Cano & Frago- so suggest that police brutality is an endemic practice, where violent acts and victimization are typically not treated as law-breaking behaviors,⁶⁴ but as “externalities of police work”.⁶⁵ Similarly, Westley asserts that violence is an accepted tool within police organizations.⁶⁶ Torture and illegal methods are often tied to investigative procedures, such as extracting confessions, witness statements, or testimonies from accomplices. These findings suggest that Mexico’s ER system has done little to limit police corruption.

The prohibition of self-incrimination is firmly enshrined in both the Federal Constitution and the National Criminal Procedures Code. These provisions unequivocally ensure that incriminating evidence cannot be obtained through coercive methods. Before the constitutional reform of 2008, judicial interpretations failed to explicitly recognize the ban on illegally obtained evidence, resulting in a lack of legal precedents supporting this important principle. In addition, the Mexican Court has used three different exceptions to the exclusionary rule: inevitable discovery, independent source and attenuation doctrine.

According to the Mexican Federal Courts interpretation, the Inevitable Discovery exception exists when illegally obtained evidence could have been unavoidably acquired through legal means.⁶⁷ Additionally, Federal Courts have ruled that evidence presented following an illegal detention should not automatically be deemed inadmissible if it inevitably would have been discovered by lawful methods.⁶⁸

The “independent source” theory has also been referenced by Federal Courts. The fact that a defendant’s statement is deemed invalid due to being obtained without legal counsel does not automatically require the exclusion of their testimonies from the corresponding analysis, as doing so would violate the principle of exclusion. This is because the two pieces of evidence are independent, with no causal connection between them.⁶⁹ Another interpretation by these Courts states that if a defendant’s statement given through a Gesell chamber is nullified due to the absence of an attorney, it does not follow that

⁶³ Lucía Jasso & Carolina Jasso, *Abuso policial, discrecionalidad y tecnologías de vigilancia en América Latina*, 42 IZTAPALAPA. REVISTA DE CIENCIAS SOCIALES Y HUMANIDADES 90, 119-144 (2021).

⁶⁴ Ignacio Cano & José Frago, *Letalidade da acao policial no Rio de Janeiro: A actuacao da Justica Militar*, 8 REVISTA BRASILEIRA DE CIENCIAS CRIMINAIS 30, 207-233 (2000).

⁶⁵ PHILIP STINSON, CRIMINOLOGY EXPLAINS POLICE VIOLENCE, (University of California Press, 2020).

⁶⁶ William Westley, *Violence and the Police*, 1 AMERICAN JOURNAL OF SOCIOLOGY 59, 34-41 (1953).

⁶⁷ Tesis: (II Región) 1o.6 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Septiembre de 2019, Tomo III, p. 2006, Registro: 2020672.

⁶⁸ Tesis: I.1o.P.50 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 45, Agosto de 2017, Tomo IV, p. 3031, Registro 2015004.

⁶⁹ Tesis:I.9o.P.63P, Gaceta del Semanario Judicial de la Federación, Décima Época, t. III, septiembre de 2014, p. 2529. Registro número 2007446.

independently obtained evidence, unrelated to those proceedings, must also be excluded.⁷⁰

The “attenuation connection” exception, interpreted by Mexican Federal Courts, applies when evidence is obtained illegally but the accused voluntarily testifies before the prosecutor or judge, provided the statement is made in accordance with constitutional rights.⁷¹ However, these exceptions are not explicitly regulated in the National Criminal Procedures Code. As for the independent source doctrine, the Supreme Court has ruled that if the evidence in question lacks a causal connection to the illegally obtained evidence, it may still be admitted and assessed for probative value by judicial authorities.

Regarding the attenuation doctrine, Mexico’s Circuit Courts have ruled that if the accused freely, voluntarily and spontaneously provides a statement before judge or a prosecutor, confirming a prior declaration, admitting to facts, or denying allegations; such testimony remains admissible even if supported by illegally-obtained evidence. This applies when the tainted evidence is not directly connected to the accused’s voluntary statement. The doctrine addresses the tainting effects of illegally obtained evidence, which can extend to other probative information, commonly referred to as the “fruits of the poisonous tree”. One relevant article of the Criminal Procedures Code references this doctrine, stating that: “Judges will declare an act is not legally valid when it has not been possible to validate it and under the parties’ request. Here, judges must decide specifically the acts that are affected by such invalidities”.⁷²

There are only two judicial interpretations concerning the “fruit of the poisonous tree” doctrine. The first states that, under the criminal procedural system, judges must evaluate evidence in accordance with logical rules, scientific knowledge, and the maxims of experience. A key logical principal is that, if the source of evidence is tainted, any subsequent evidence derived from it is also corrupted, as it stems from illegally obtained information. The second judicial interpretation regarding this doctrine clarifies that the exclusion of illegally obtained evidence applies not only to evidence directly violating fundamental rights but also to any derivative evidence obtained as a result. However, the doctrine does not extend to evidence deemed merely irregular, that is, evidence initially gathered and introduced into the criminal proceedings without strict adherence to formal legal procedures. Unlike unlawful evidence, irregular evidence can be rectified as it has not been classified as outright illegal.

Finally, it is important that the precedents set by the Supreme Court do not offer sufficient guidance on the exceptions to the Exclusionary Rule. The Court’s analysis has been confined to the independent source and attenuation

⁷⁰ Tesis: I.9o.P.J/16 (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, t.II, libro 20, julio de 2015, p. 1583. Registro: 2009552.

⁷¹ Tesis: (II Región)1o.5 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Septiembre de 2019, Tomo III, Página: 2007, Registro: 2020673.

⁷² NATIONAL CRIMINAL PROCEDURES CODE, MÉXICO. ARTICLE 101.

doctrine.⁷³ Additionally, it is worth noting that during the 2008 legislative reform, Mexico's Congress showed reluctance to incorporate exceptions to the rule.

2. Risks of a Flexible System to the Exclusionary Rule

A counterargument to this perspective is that allowing exceptions to the prohibition of illegal evidence in the National Criminal Procedures Code undermines defendants' human rights. So far, Mexican criminal regulations have shown no signs of embracing the potential admission of illegal evidence, and human rights advocates have strongly opposed it. One of the most serious risks of introducing exceptions to the Exclusionary Rule is that it may foster public perception that the criminal justice system is neither strong nor effective in combating crime, potentially resulting in the release of guilty parties.

Furthermore, media coverage of legal changes presents an additional risk by potentially emboldening criminals, who may believe they can act with impunity, thus incentivizing illegal behavior. However, despite exceptions in the American and Canadian legal systems, motions to suppress such evidence remain relatively rare and have not led to rise in criminal activity.

VI. Summary and Conclusions

Both the Exclusionary Rule and its exceptions have been controversial in the common law for Mexico's northern neighbors for over a century. Now, Mexico finds itself in the early stages of a similar trajectory, one that will likely involve numerous court cases, evolving precedent, and potentially decades of legal development without clear political, legal or social consensus.

To avoid generations of legal conflict and public discord, we propose that Mexico address this issue directly, through legislative action. Congressmen should evaluate relevant historical documents, such as the U.S. Constitution's Fourth and Fifth Amendments and the Canadian Charter along with pertinent legal precedents. Furthermore, the legislation should articulate clear and concise exceptions to the exclusionary rule, preventing courts from creating ad hoc exceptions. The amendment's application should also be precisely defined in the National Criminal Procedures Code and automatically extended to the states. As U.S. District Judge Mary Scriven stated in an interview when asked whether ER interpretations should primarily rest with courts or Congress, she remarked, "We [judges] wish the legislature would give us more [legislative] guidance" lamenting that the ER has become perplexing with "not only exceptions but exceptions to the exceptions".⁷⁴ Mexico's Congress now has a unique opportunity to provide substantive clarity and judicial guidance.

⁷³ Anaya et al., *supra* note 44.

⁷⁴ Interview with Mary Scriven, US District Judge, in Tampa, Florida. (September 14th,

Recognizing the legitimate concern regarding impunity for particularly egregious crimes, and criminals who commit them, on what could be perceived as technicalities, the law could incorporate “a scale of exclusion” that offers stronger protections in minor cases (e.g., theft) and reduced protections in more serious cases, particularly those involving drug cartels. While this may seem like an unequal application of the law, history demonstrates that such a de facto approach has long been used in the U.S. and Canada under the Exclusionary Rule. Mexico would simply be formalizing a measure that would likely evolve organically, even without formal legislative action. We believe that well crafted, substantive guidelines would provide judges with a valuable framework for adjudicating evidentiary concerns.

Therefore, legal provisions must include exceptions to the rule, given that written law is the primary main legal source in Mexico. One of the key shortcomings in the Mexican regulation of the Exclusionary Rule is that the National Criminal Procedures Code fails to specify any exceptions to the prohibition of illegally obtained evidence. Currently, the exclusion of such evidence is absolute, meaning that any tainted evidence introduced in a legal proceeding will be deemed devoid of probative value and rendered null.

Mexico should not hesitate to introduce exemptions to the exclusion of evidence, especially since, as previously explained, impunity does not stem from prohibiting improperly obtained evidence. As Teresa Armenta⁷⁵ points out, the exclusion of illegally obtained evidence should not be absolute.

A starting point in the ER regulation should include a “crime seriousness test”. In fact, Bellin suggests Mexico should consider the discussion of the so-called crime-severity distinction in such a way that courts can make case-by-case assessments of the offense severity.⁷⁶ This, however, would be difficult under traditional common law and judicial review and thus must be codified by the legislature and ratified in the Constitution.

In this regard, it is necessary to establish a clear regulation clarifying specific cases where illegal pieces of evidence deserve to be excluded from criminal procedure. As mentioned before, every crime investigation has its features, and not all illegal conduct has the same impact on society. At the same time, not all police actions generate the same damage to those suspected of having committed a crime. In other words, the *small*, good-faith errors perpetrated by the police while investigating felonies should not summarily be excluded. However, if more serious violations of individual rights take place during an investigation of mere/ordinary infractions, they should result in the exclusion of the corrupted piece of evidence.

2023).

⁷⁵ TERESA ARMENTA DEU, LA PRUEBA ILÍCITA: UN ESTUDIO COMPARADO 188 (EDITORIAL MARCIAL PONS, 2DA ED., 2011)

⁷⁶ Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 3-48 (2011).

In its first decade of transition to an adversarial system Mexico is already struggling with issues that the U.S. and Canada have faced before, including ER's efficacy in reducing police corruption, contaminating the reputation of the court by entering illegal evidence and the concerns that guilty criminals will go free. Further, these legal conflicts continue in both the U.S. and Canada.

Mexico possesses sufficient competent jurists who could interpret the law and create legal precedents that can make the Exclusionary Rule work efficiently. However, this article suggests that the best possible outcome for Mexico is to develop a more proactive, legislative-driven legal framework which follows the lessons learned from over a century's worth of common law, controversies and actual outcomes in the legal systems of its northern neighbors. This would help to craft an Exclusionary Rule framework that fits Mexico's culture and societal norms rather than waiting three generations of *stare decisis*. If U.S. and Canadian history is any guide, a rule change is needed that aims for a more direct change that provides substantive legal guidelines on police powers, prosecutorial discretion, judicial review, admission of evidence, etc.

The incorporation of extensive and well-crafted regulations aims to ensure that judges admit or deny evidence depending on crime severity distinctions. With this specificity, courts would be able to easily identify and assess serious crimes and non-custodial offenses by allowing for a broader investigation of high-impact crimes and enabling concrete limits on investigations of minor crimes.

In addition, an extra-legal step would be the swift implementation and use of "body cams" in Mexico. As District Judge Mary Scriven has said,⁷⁷ contemporary experience in U.S. courts suggests that video and audio evidence make admissibility arguments less relevant since there is clear media evidence of the event and courts no longer need to rely solely on law enforcement or defendant testimony. Courts can now directly see if a violation has indeed occurred. We believe additional sources of audio and video evidence from dash cameras (police and citizen), closed-circuit television, cell phone records, etc., would definitely aid in legal determinations of admissibility.

Mexico's legislature must provide a mechanism that addresses civil remedies for those whose rights are violated. We believe these may be codified in legislature with specific guidelines and penalty ranges that presiding judges would follow. That is, the judge in the criminal trial would have the flexibility to assign a civil penalty (e.g., fine) when there has been a rights violation without the need for a defendant to file a separate civil tort. This would redress individual grievances and limit the need for recourse to third parties in tort courts.

Finally, we consider it important to address potential judicial errors or malfeasance. While a more thorough discussion is outside the scope of this article, we offer two suggestions. First, Mexico could create a judicial commission with

⁷⁷ Interview with Mary Scriven, US District Judge, in Tampa, Florida. (September 14th, 2023).

specific review and remedy powers (e.g., mandated compensation to the victim of a violation; discipline of the offending judge) when there is judicial error or misconduct. While this may seem like a daunting task, the limited number of cases it would review makes it manageable. Secondly, Mexico must reinforce judicial ethics and the principle that, perhaps more than any other branch of government—as it does not have the command of the military or law enforcement—the Judiciary depends on the faith and trust of the citizenry, as well as the other branches of government, for its rulings to be enforced.

VII. References

- PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 1045 (Oxford University Press, 2013).
- MIGUEL ANAYA & PAOLA DE LA ROSA, *LA PRUEBA ILÍCITA, SUS PREMISAS, REGULACIÓN Y EXCEPCIONES EN EL SISTEMA PENAL ACUSATORIO* 116 (México: Flores Editor y Distribuidor, 2017) ERIK PEREZ LOYO, *LA PRUEBA ILÍCITA* (México: Flores Editor y Distribuidor, 2022).
- TERESA ARMENTA DEU, *LA PRUEBA ILÍCITA: UN ESTUDIO COMPARADO* 188 (EDITORIAL MARCIAL PONS, 2DA ED., 2011).
- Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 3-48 (2011).
- Robert Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AMERICAN JOURNAL OF CRIMINAL LAW, No. 079, 79-104 (1992).
- Peter Brooks, *Inevitable Discovery-Law, Narrative, Retrospectivity*, YALE J. OF LAW AND THE HUMANITIES, 2013, in 71.
- John Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655. (1982).
- Luis Calero, *Aspectos materiales y procesales del principio acusatorio: problemas probatorios, prueba ilícita y procesos penales socialmente relevantes. La exclusión de pruebas ilícitamente obtenidas en el Derecho Procesal de los Estados Unidos*, 66 REVISTA DEL PODER JUDICIAL, 367-401 (2002).
- Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. OF CRIM. L., May 12th, 2012, at 357.
- Ignacio Cano & José Frago, *Letalidade da acao policial no Rio de Janeiro: A atuação da Justiça Militar*, 8 REVISTA BRASILEIRA DE CIENCIAS CRIMINAIS 30, 207-233 (2000).
- Carlos Correa Robles, *La función de la exclusión de la prueba ilícita en el proceso penal y sus consecuencias: un estudio comparado*, 16 POLÍTICA CRIMINAL 32, 644-677 (2021).
- International Covenant on Civil and Political Rights, 1976.
- Thomas Davies, *A Hard Look at What We Know and Still Need to Learn About the Costs of the Exclusionary Rule*, USA, AMERICAN BAR ASSOCIATION 611 (1983).

- Wayne Gorman, *The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada*, 54 COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION 1, 113 (2018).
- Bradley Graveline, *Fourth Amendment-An Acceptable Erosion of the Exclusionary Rule*, 79 J. CRIM. L. & CRIMINOLOGY 647 (1988).
- Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1 (1982).
- Robert Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE L.J. 4, 798 (1992).
- INEGI, Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública (ENVIPE) (2024).
- INSTITUTE FOR ECONOMICS AND PEACE, ÍNDICE DE PAZ 2 (México 2019). <https://www.economicsandpeace.org/wp-content/uploads/2020/08/Mexico-Peace-Index-2019-Spanish.pdf>
- Lucía Jasso & Carolina Jasso, *Abuso policial, discrecionalidad y tecnologías de vigilancia en América Latina*, 42 IZTAPALAPA. REVISTA DE CIENCIAS SOCIALES Y HUMANIDADES 90, 119-144 (2021).
- Stephen Kaczynski, *Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule*, ARMY LAW, 1(1984).
- Yale Kamisar, *Brewer v. Williams, Massiah and Miranda, What Is 'Interrogation'-When Does It Matter*, 67 GEO. L.J. 1 (1978).
- Matthew D. Kim, *The Exclusionary Rule and Judicial Integrity: An Empirical Study of Public Perceptions of the Exclusionary Rule*, 87 MO. L. REV. (2023).
- Edwin Fee, Jr., *Criminal Procedure I: Narrowing the Protection of the Fourth Amendment*, ANN. SURV. AM. L. 371. (1989)
- James Fishkin, *Nix v. Williams, An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 IOWA L. REV 1369 (1984).
- Mike Lavin, *The Impact of the Exclusionary Rule Upon the Montana Criminal Justice System, United States*, NATIONAL INSTITUTE OF JUSTICE (1984) <https://www.bjs.gov/content/pub/pdf/ierumcjs.pdf>
- Jose Luengo & Tessa Butler, *Impunity in Mexico: A Rising Concern*, JUSTICE IN MEXICO, (MAY, 4, 2018), <https://justiceinmexico.org/impunity-mexico-rising-concern/>
- PETER NARDULLI, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 3, 585-609 (1983).
- Esther Nir, *Empowering the Exclusionary Rule: Using Suppression Motion Data to Improve Police Searches and Searches in the United States*, 22 INTERNATIONAL JOURNAL OF POLICE SCIENCE & MANAGEMENT 1, 96-107 (2020). <https://doi.org/10.1177/1461355719888945> Last consulted February 10th, 2025.
- Myron Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 THE UNIVERSITY OF CHICAGO LAW REVIEW 3, 1016-1069 (1987).

- Debra Osborn, *Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia*, 1 ELAW JOURNAL, MURDOCH UNIVERSITY ELECTRONIC JOURNAL 44, (2000).
- Richard Posner, *Rethinking the Fourth Amendment*, 49 THE SUPREME COURT REVIEW, 49-80 (1981).
- REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 14 (1979).
- Marien Rivera & Rafael Chávez, *Presentan cifras de inseguridad en México*, 1 NÚMEROS ROJOS DEL SISTEMA PENAL 1, 1-17 (2011). Joanna Schwartz, *After Qualified Immunity*, 120 COLUMBIA LAW REVIEW 2, 309-388 (2020).
- José Serna, *The Concept of Jurisprudencia in Mexican Law*, 1 MEXICAN LAW REVIEW, NO.2 5 (2009).
- Liu Siyu & Esther Nir, *Mission Impossible? Challenging Police Credibility in Suppression Motions*, 33 CRIMINAL JUSTICE POLICY REV. 6, 584-607 (2021).
- Eileen Skinner, *Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada*, INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY 6, 1-26 (2005).
- Robert Smith, *Herring v. United States: The Continued Erosion of the Exclusionary Rule*, 61 MERCER LAW REVIEW, NO. 2, ARTICLE 9 (2010).
- James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 BOSTON COLLEGE INTERNATIONAL AND CORPORATIVE L. REV. 1, 77-140 (1999).
- PHILIP STINSON, CRIMINOLOGY EXPLAINS POLICE VIOLENCE, (University of California Press, 2020).
- Tesis: CLXII/2011, Semanario Judicial de la Federación y su Gaceta, Novena Época, t. XXXIV, agosto de 2011, p. 226. Registro 161221.
- Tesis 139/2011, Semanario Judicial de la Federación y su Gaceta, Décima Época, t.3, diciembre de 2011, p. 2057. Registro: 160509
- Tesis: 1a./J. 35/2015 (10a.), Gaceta del Semanario Judicial de la Federación, Primera Sala, Décima Época, t. 1. libro 18, mayo de 2015, p. 302. Registro número 2009008.
- Tesis: (II Región) 1o.6 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Septiembre de 2019, Tomo III, p. 2006, Registro: 2020672.
- Tesis: I.1o.P.50 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 45, Agosto de 2017, Tomo IV, p. 3031, Registro 2015004.
- Tesis:I.9o.P.63P, Gaceta del Semanario Judicial de la Federación, Décima Época, t. III, septiembre de 2014, p. 2529. Registro número 2007446.
- Tesis: I.9o.P.J/16 (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, t.II, libro 20, julio de 2015, p. 1583. Registro: 2009552.
- Tesis: (II Región) 1o.5 P (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Septiembre de 2019, Tomo III, Página: 2007, Registro: 2020673.

- Matthew Tokson & Michael Gentithes, *The Reality of the Good Faith Exception*, GEORGETOWN LAW JOURNAL 546, 1-57 (2023).
- CRAIG UCHIDA & TIMOTHY BYNUM, EFFECTS OF “UNITED STATES VS. LEON” ON POLICE SEARCH WARRANT PRACTICES, (1984-1985, Stanford libraries). <https://www.icpsr.umich.edu/web/NACJD/studies/9348>
- USAID, OBSERVATORIOS DE AUDIENCIAS Y RESOLUCIONES JUDICIALES. ESTADO DE MÉXICO Y BAJA CALIFORNIA (2023).
- Malcolm Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JOURNAL JUDICATURE 5, 214-232 (1978).
- William Westley, *Violence and the Police*, 1 AMERICAN JOURNAL OF SOCIOLOGY 59, 34-41 (1953).
- WORLD JUSTICE PROJECT, ÍNDICE DE ESTADO DE DERECHO EN MÉXICO 2019-2020 (2020).
- Carolyn Yagla, *The Good Faith Exception to the Exclusionary Rule: The Latest Example of “New Federalism” in the States*, 71 MARQUETTE L. REV. 1, 15 (1987).