Rethinking on the Deterrent Rationale of the Exclusionary Rule in American and its Enlightenment

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Abstract: The deterrence rationale is a theoretical pillar for the Supreme Court of the United States to establish and apply the exclusionary rule. Its basic logic is to weaken an official's incentive to illegally obtain evidence by excluding illegally obtained evidence and then to compel the official and his peers to abide by the law in the future law enforcement activities better. The deterrence rationale used to be an important reason for the Court to exclude illegally obtained evidence. However, with the continuous shrinking of the exclusionary rule, both the Court and theoretical cycles deeply rethink the deterrence rationale, and they deem that it is difficult for the exclusionary rule to deter an official's unlawful activities in practice. It means that it is very necessary to rethink the tendency of relying heavily upon the exclusionary rule on this issue of coping with procedural illegal activities in China because there are serious defects in the deterrence rationale.

Keywords: The exclusionary rule; Deterrent function; Deterrence rationale

1 Introduction

In recent years, with the continuous emergence of the problems of extorting confessions by torture and wrongful convictions, coupled with the rise of the theory of procedural justice and the theory of human rights protection, the research on the rule of exclusion of unlawful evidence in China's theoretical circles can be said to have reached an unprecedented degree of obsession, and there are countless topics, writings, theses, and reports related to the rule of exclusion of unlawful evidence. And all walks of life for the recognition of the harm of illegal evidence collection behavior and the aspiration for procedural justice and human rights protection, also makes the whole society to form a kind of curb illegal evidence collection behavior of a thick atmosphere. Against this background, people not only believe in the effectiveness of the rule of exclusion of illegal evidence in illegal evidence-taking behavior, but also for the improvement of China's rule of exclusion of illegal evidence by learning from the successful experience of Western countries, has long formed a broad consensus.

Although the author is also firmly opposed to illegal forensic behavior, and that illegal forensic behavior is China's urgent need to solve a major problem, but for illegal evidence exclusion rules can solve China's illegal forensic behavior, in the absence of empirical research the author is not as optimistic as the mainstream view.[1] After all, China and western countries in the legal tradition, the concept of the rule of law, the level of the rule of law, the institutional environment and many other aspects of the significant differences in the western countries can be successful rule of illegal evidence exclusion does not mean that in China is bound to be the same. What's more, in the western developed countries, not only in the theory of the community on the exclusion of illegal evidence rule there are all kinds of controversy, and illegal evidence exclusion rule of the actual effect is not as magical as the proponents of the boast. Especially in the high crime rate and violent crimes, terrorist crimes and other serious crimes against the social order of the lingering situation, the demand for reform or even the abolition of the rule of illegal evidence exclusion of the voice is also rising. Even in the United States, the most developed rule of exclusion of illegal evidence, criticizing the rule of exclusion of illegal evidence of the voice is not inferior to the voice advocating the rule of exclusion of illegal evidence. But it is strange, in China's rule of law environment, procedural concepts, the institutional foundation is still unsatisfactory, the theoretical community is actually excited to foreign controversial illegal evidence exclusion rules as a Chinese

solution to illegal evidence collection behavior panacea.

In the author's opinion, although all walks of life have reached a consensus on curbing illegal evidence through illegal evidence exclusion rules, and China has amended the criminal procedure law to formulate the expected illegal evidence exclusion rules, but we should not be in the illegal evidence in the same enemy type of fight in the voice of worship in the western countries still exist in the greater controversy of illegal evidence exclusion rules. In view of this, this paper intends to take the United States as an example of the most developed rule of exclusion of illegal evidence, the modern criminal procedure law establishes the rule of exclusion of illegal evidence of one of the most important theoretical basis - deterrence theory for a systematic combing, in order to realize the limitations of the rule of exclusion of illegal evidence, so that China can further improve the rule of exclusion of illegal evidence, which is beneficial to China's further improvement. The exclusion of illegal evidence rule in China will be beneficial to the further improvement of the rule.

2 Deterrence Theory as a Pillar of The Exclusionary Rule

The theoretical basis is the logical premise for the establishment of the rule of exclusion of illegal evidence. Although the rule of exclusion of illegal evidence has become a universally recognized rule of evidence, based on differences in cultural traditions, values, legal concepts and litigation modes, the theoretical basis or focus of countries in establishing the rule of exclusion of illegal evidence is not the same. However, based on the similarity of procedural violations and criminal acts, modern countries in the establishment of the rule of law in the process of illegal evidence exclusion rules often draw on the basic principles of criminal law and criminology, hope that by excluding illegal evidence to prevent or deter the investigators of illegal evidence collection. The following is a brief examination and analysis of the deterrence theory in the exclusionary rules, taking the United States as an example.

2.1 The Establishment and Development of Deterrence Theory in the U.S. Supreme Court

Illegal evidence-taking is not only a serious violation of the legitimate rights of citizens, but also an important manifestation of the abuse of State power by investigating authorities. In terms of its harmfulness and the nature of the act, illegal evidence collection and criminal behavior is actually a tort. Perhaps it is based on this point, the U.S. Supreme Court in the establishment and improvement of illegal evidence exclusion rules in the process of drawing on the basic principles of criminal punishment, deterrence theory as a pillar of illegal evidence exclusion rules of theoretical basis.

An early exponent of the deterrence doctrine in the U.S. Supreme Court was Justice Murphy. In the 1949 case of Wolfe v. Colorado, the U.S. Supreme Court ruled by a 6-3 vote to uphold the Colorado Supreme Court's conviction of Wolfe, holding that although the Fourth Amendment to the Constitution applies to the states, it does not require the states to exclude evidence obtained through illegal means.[2] Justice Murphy's dissent in this case, however, expressed the ideas underlying the deterrence theory. Comparing the exclusionary rule with criminal prosecution and civil litigation, Justice Murphy argued that if "relief" means positive deterrence of police and prosecutors inclined to violate the Fourth Amendment, then criminal prosecution or civil litigation against violators is an illusory relief.[3] And "only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.."[4]

In the 1960 case of Elkins v. United States, Justice Stewart of the U.S. Supreme Court expressed a view similar to that of Justice Murphy in delivering his sentencing opinion. He argued that the illegal evidence exclusionary rule is intended to prevent, not to repair. The purpose of the exclusionary rule is to deter. That is, by removing the incentive to disregard the Constitution,

it is the only effective way to ensure that the Constitution is respected.[5] In the landmark case of Mapp v. Ohio, the U.S. Supreme Court not only reaffirmed this idea[6], but also rejected the silver platter theory[7] as an important logical basis for the application of the unlawful evidence exclusionary rule to the states. The opinion in that case, written by Justice Clark, held that " a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment……In nonexclusionary States, federal officers, being human, were by it invited to, and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated."[8] In the 1974 case of United States v. Calandra, the opinion, written by Justice Powell, was even more explicit in stating that "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[9] The 1987 opinion in Illinois v. Krull, written by Justice Blackmun, reiterated this point.[10] It is because the U.S. Supreme Court has repeatedly emphasized the deterrent function of the exclusionary rule that James Tomkovicz, a professor at the University of Iowa College of Law, commenting on the theoretical underpinnings of the exclusionary rule, argues that deterrence of future violations of the Fourth Amendment to the Constitution is a popular theory of the U.S. Supreme Court in upholding the rule of illegal evidence exclusion.[11]

2.2 Doctrinal interpretation of the deterrent function of the exclusionary rule

In American legal theory, the deterrent function of the exclusionary rule includes three types, namely, special deterrence, general deterrence and systemic deterrence. Special deterrence and general deterrence of illegal evidence exclusion rules are two concepts created by University of Chicago law professor Oaks. And systemic deterrence is a concept developed by Georgetown University J.D. Mertens and Amherst College Associate Professor of Law Wasserstrom. Special deterrence of illegal evidence exclusion rules, also known as special prevention (special prevention), refers to the deterrent effect that the exclusion of illegal evidence has on violators. According to Ochs, law enforcement officials are of course frustrated when they see evidence they have collected being excluded and resulting in criminals getting away with it. This may affect his behavior in the future. If this law enforcement officer has to be subjected to internal disciplinary action or loses promotional opportunities, reputation or other benefits as a result of the application of the rule of exclusion of unlawful evidence to the case he is working on, then these may give the rule of exclusion of unlawful evidence an important special preventive effect.[12]In his dissenting opinion in United States v. Lyon, Justice Brennan also noted that, in the context of the illegal evidence exclusionary rule, the deterrence doctrine was not intended to devise a "form of punishment" for individual police officers who failed to comply with the limitations of the Fourth Amendment. [13] Bradley, a law professor at Indiana University at Bloomington, agreed: "The exclusionary rule is an indirect remedy, aimed at deterring future police misconduct, rather than remedying the wrong that has occurred in this case. The court cannot unsearch the arrestee, and an innocent victim of an illegal search derives no benefit from the exclusionary rule at all."[14]

In light of this, Oaks focuses more on the general deterrence or general prevention of illegal evidence exclusion in order to reach a broader audience, such as guiding law enforcement officers to comply with the rules of search and seizure through the exclusion of illegal evidence, emphasizing the importance of complying with the rule through the application of illegal evidence exclusion rules, and fostering individual police officers'

habit of following the rules, etc.[15]

The institutional deterrence of the exclusionary rule aims to influence individual police officers by prompting police departments to promote the construction of relevant systems through the application of the exclusionary rule. After all, police departments are more concerned about the success of criminal prosecution than individual police officers.[16] Commenting on the deterrence theory of the exclusionary rule, Justice Stewart also noted that "the exclusionary rule is not designed to serve a specific deterrence function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a systematic deterrence: the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system-bringing criminals to justice-can be achieved only when evidence of guilt may be used against defendants."[17]

Proponents of the deterrence theory generally believe that the main reason why the offender commits the illegal deposition is to collect evidence and accuse the crime. In this case, if the exclusionary rule can be excluded through the illegal evidence collected by the offender, then the offender may not be able to obtain the corresponding benefits[18] from the illegal forensic behavior, thus weakening the offender to implement the illegal forensic behavior of the incentives. In the case of illegal forensic behavior without profit, the offender may be in the future law enforcement activities in accordance with the law to collect evidence. For example, Professor James Tomkovicz has argued that "because the government is forbidden from conducting unreasonable searches and seizures, it is not entitled to the possession of evidentiary items it discovers as a result. To enforce the Fourth Amendment in the present, the government must not be allowed to exploit in the courtroom any advantages gained by conducting unlawful searches and seizures. The exclusionary rule is justified because the Fourth Amendment grants accused individuals a constitutional entitlement to protection against the use of evidence at trial, which saddles the government with an obligation not to use that evidence to convict."[19] Further, the exclusionary rule is designed to make unconstitutional conduct unprofitable, thereby removing the incentive to disregard the limitations of the Fourth Amendment. If unreasonable searches and seizures do not produce an evidentiary benefit in the government's effort to prosecute and prove crimes, then law enforcement officers will have no incentive to conduct them, and police departments will have an incentive to take appropriate measures to train law enforcement officers. Only by allowing only evidence gathered in constitutionally compliant searches and seizures to be used to prove a crime will law enforcement officers have a good reason to understand the requirements of the Fourth Amendment and to comply with them.[20]

It is because the underlying logic of deterrence theory is to promote better compliance by violators in future enforcement activities by weakening the incentive to violate the law that some scholars have summarized the deterrent function of the illegal evidence exclusionary rule as a theory of corrective discipline or The Disciplinary Principle. For example, Mirfield argues, "while the protective principle is concerned with what happened to the particular accused and with providing him with an adequate remedy where improperly treated, the disciplinary principle has wider concerns. It looks to cases which have not yet arisen. If the police are denied the use of evidence in the present case because of their failure to achieve acceptable standards of conduct, they will be more likely to achieve acceptable standards in future cases. In the short term, both the police officer involved in the present case and other police officers who get to know about the decision of the court to exclude the evidence will be deterred. In the long term, perhaps, the court will, by defining the boundaries of proper conduct in such a concrete fashion, educate police officers to respect those boundaries."[21]

3 The Controversial Theory of Deterrence

Although the U.S. Supreme Court created the exclusionary rule that has attracted worldwide attention and had a far-reaching impact on the U.S. criminal justice system and even criminal procedures in countries all over the world, the exclusionary rule is a topic of divergent opinions both within the U.S. Supreme Court and in the theoretical world. Even for the theory of deterrence in the exclusionary rule, this is also true.[22]

3.1 U.S. Supreme Court Reflections on Deterrence Theory

Although the U.S. Supreme Court gradually adopted the deterrence theory as one of the most important theoretical underpinnings of the illegal evidence exclusionary rule after the 1960s, it began to waver from the deterrence theory after Terry v. Ohio, which emphasized the deterrent function of the illegal evidence exclusionary rule as much as it had in the past. In the 1968 Terry case, Chief Justice Warren, writing the opinion, argued that the exclusionary rule would be ineffective in deterring police violations of constitutional rights if the police were uninterested in the charges or voluntarily dropped successful charges in order to achieve other ends[23]. In the 1974 case of Michigan v. Tucker, Rehnquist issued a sentencing opinion that held that the deterrent purpose of the exclusionary rule necessarily presumes that police officers intentionally, or at least negligently, deprive a defendant of certain rights. By refusing to admit evidence obtained in this manner, the court instills in these investigators, or their counterparts, the notion that they are expected to be more attentive to the rights of the accused. However, the deterrence doctrine loses its effectiveness when the police act in complete good faith. [24]

In the 1976 case of U.S. v. Janis, Justice Blackmun, writing the opinion, after briefly combing through the research findings on the exclusionary rule for illegal evidence, concluded that neither the empirical researchers of the exclusionary rule, nor the advocates or opponents of the exclusionary rule had been able to prove with certainty that the exclusionary rule had a deterrent effect[25]. In the 1984 Lyon case, Justice White wrote the opinion holding that even assuming that the exclusionary rule is effective in deterring some police violations and in motivating the entire law enforcement force to comply with the Fourth Amendment, we do not believe that the exclusionary rule should be utilized to deter objectively reasonable conduct by law enforcement officers.[26] In his dissenting opinion, Justice Brennan went so far as to argue that " the deterrence theory is both misguided and unworkable"[27]; and that " by remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy"[28].

3.2 The Uncertainty of Empirical studies

Just as Justice Blackmun pointed out, some empirical studies in the United States are also somewhat divided on the deterrent function of the exclusionary rule. Some scholars argue that despite the empirical studies conducted by some researchers, no one has been able to produce convincing evidence of the deterrent effect of the exclusionary rule on unlawful searches and seizures.[29] For example, after empirically analyzing cases of gambling, drug, and weapons offenses in places such as the District of Columbia and Chicago, Professor Oaks argues that the illegal evidence exclusionary rule has completely failed as a legal device for directly deterring unlawful searches and seizures by police. This is not only because there is no reason to expect the illegal evidence exclusionary rule to have a direct effect on the vast majority of police behavior that does not lead to prosecution, but also because there is little evidence that the illegal evidence exclusionary rule has any deterrent effect on the small percentage of law enforcement behavior that is intended to be prosecuted. [30]Again, based on 7,500 criminal cases in three states, including Illinois and three other states, an associate professor at the University of Illinois, analyzing the costs of the exclusionary rule, found that the rule had only a slight impact on criminal proceedings. The success rate for motions to suppress evidence is very low. The success rate for motions to exclude physical evidence is only 0.69 percent, while the success rate for motions to exclude

identification and confessions is only 0.08 percent and 0.16 percent, respectively. Not all cases of successful exclusion of evidence resulted in acquittal. Statistics show that only 0.6% of cases resulted in acquittal due to the exclusion of illegal evidence.[31] In 1979, the General Accounting Office of the U.S. Congress, in a study of the impact of the illegal evidence exclusionary rule on criminal prosecutions, also found that of the 2,804 criminal cases prosecuted from July 1 through August 31, 1978, 16% of the defendants filed motions to suppress evidence, including 33% of those based on the Fourth Amendment to the Constitution; and that, although the majority of the defendants participated in the formal investigative hearing process, the vast majority of the motions were not sustained by the courts, i.e., illegal evidence was excluded in only 1.3% of the cases; and the number of non-indictments as a result of unlawful searches and seizures involving Fourth Amendment issues was only 0.4% of the total number of cases.[32]

However, there are also empirical studies that argue that the exclusionary rule has a deterrent effect. For example, the National Institute of Justice of the United States Department of Justice, on the basis of data from the State of California from 1976 to 1979, found that the exclusion of illegal evidence rule had a significant impact on felony cases, especially drug cases, in that state. Analysis of the data showed that non-indictments due to Fourth Amendment issues accounted for 4.8 per cent of the number of felony cases; in drug cases, 30 per cent of deeming arrests were denied because of illegal search and seizure issues, and 71.5 per cent of non-indictments were due to issues involving illegal searches and seizures.[33] However, some scholars have challenged the findings of the Institute of Justice, arguing that the exclusionary rule results in between 0.6% and 2.35% of arrests for felonies being waived. When these data are recalculated based on the total number of arrests, arrestees who waived charges due to unlawful seizure of evidence accounted for only 0.8 percent of the total number of arrests.[34]

It was precisely because empirical studies could not determine whether the exclusionary rule had a deterrent effect that the United States Supreme Court declared in the 1975 Farida case that "personal liberties are not rooted in the law of averages".[35] In his dissenting opinion in the 1984 Lyon case, Justice Brennan also argued that "to the extent empirical data are available regarding the general costs and benefits of the exclusionary rule, such data have shown, on the one hand, as the Court acknowledges today, that the costs are not as substantial as critics have asserted in the past, and on the other hand, that, while the exclusionary rule may well have certain deterrent effects, it is extremely difficult to determine with any degree of precision whether the incidence of unlawful conduct by police is now lower than it was prior to Mapp…… A doctrine that is explained as if it were an empirical proposition, but for which there is only limited empirical support, is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties".[36]

According to the empirical research of American scholars Raymond A. Atkins and Paul H. Rubin, the application of the exclusionary rule of illegal evidence is not only difficult to deter law enforcement officers from violating the law as the scholars expected, but also brings about the evil consequence of an increase in crime rates. American scholars' economic analysis of the search warrant process predicted that crime rates would rise after the Supreme Court forced states to adopt the exclusionary rule because police would abandon searches in favor of other methods they considered less effective. And their empirical analysis supports this theoretical prediction. Their empirical study found that crime rates rose statistically and economically significantly after the Supreme Court implemented the exclusionary rule, with suburban cities bearing the brunt of the Supreme Court's decision. Further, looking at state-by-state aggregate data, the Mapp case increased larceny by 3.9 percent, auto theft by 4.4 percent, burglary by 6.3 percent, robbery by 7.7 percent, and personal injury by 18 percent. Moreover,

these results mask the larger impact on suburban cities - where the exclusionary rule's implementation increased violent crime by 27 percent and property crime by 20 percent.[37]

3.3 Limitations of deterrence theory

Although the empirical research in the United States has not yet fully developed convincing affirmative or negative conclusions about the deterrent effect of the unlawful evidence exclusionary rule, it is not difficult to see the limitations of the deterrence theory, even if analyzed only from a theoretical perspective. For example, in evaluating the deterrence theory of the exclusionary rule for unlawful evidence, Professor McCormick argues that it is difficult or impossible to generalize about the possible deterrent effect of the exclusionary rule. First, any idea that artificial deterrence will be effective is naïve, as police officers often find the "threat" of exclusion of evidence to be of much less significance than other factors that need to be taken into account to influence their behavior. Second, unless the case proceeds to an active prosecution or defense, the exclusion of evidence is only a possibility. Most criminal cases end up not being litigated, so the technical admissibility of evidence will not be a factor to be considered. In the rare cases where the exclusion of evidence becomes a real possibility, the threat will also only become a reality after the police officer has ended his or her role in the case. In plea bargaining and deferred adjudication scenarios in criminal cases, the threat of exclusion of evidence may be of only such faint, remote significance that it cannot be expected to prevail in the minds of police officers over other considerations that suggest that they should have acted differently. Once again, the reality is that the other considerations may be more pressing and appeal more strongly to the officer's attention. If a police officer believes that following the requirements of the law will threaten his personal safety, he is less likely to ignore the existence of such a risk because the fruits of their actions may face legal challenge in the more distant future. Finally, there is even a risk that if an exclusionary sanction sends a clear message of deterrence to police officers, the result may be that those officers find it preferable to forgo formal prosecutions altogether and rely instead on "street justice" in support of what they perceive to be admirable behavior. If the result of an evidentiary rule is to encourage law enforcement agencies to engage in informal and largely law-absent actions, rather than encouraging them to comply with the provisions of the law and thus make prosecutions possible, then the rules arguably achieve the worst of all possible results.[38] Again, Professor Amar of Yale University has repeatedly emphasized that the exclusionary rule, which is based on the Fourth, Fifth and Sixth Amendments to the United States Constitution, is an inverted rule. This is because the exclusionary rule not only fails to have the deterrent effect advocated by its creators, but also has the inverted effect of helping criminals get away with crimes while harming innocent defendants.[39] Professor Jeffrey Standen, a professor at Willamette University, also asserts that the exclusionary rule does not provide an effective tool for deterring unconstitutional police activity.[40]

Based on the critique of the exclusionary rule by some empirical researchers, some justices of the U.S. Supreme Court, and some famous scholars, Professor Myron W. Orfield of the University of Minnesota summarizes the main reasons why the exclusionary rule fails to serve as a deterrent in four aspects. First, the organizational structure and norms of the criminal justice system undermine the effectiveness of the exclusionary rule. The exclusion of evidence under the exclusionary rule may result in a failure to convict. This result does not affect individual police officers, but the image of the criminal prosecution agencies (prosecution and police departments) as a whole. In cases where the supervisory authorities of the police do not care about the exclusion of evidence, it may serve to encourage, or at least accept, unlawful behavior. Second, evidence exclusion investigative hearings fail to guide police in the proper conduct of searches due to their confusing nature and their inability to generate useful practical experience. Once again, the illegal evidence exclusionary rule does not directly punish police when

they violate the Fourth Amendment. In such cases, the exclusionary rule does not incentivize police to correct their pattern of illegal behavior. Finally, police officers' dishonest testimony in court may eliminate the proper effect of the illegal evidence exclusionary rule. This is because, even in the case of obvious perjury by the police, judges will "look the other way" in order to admit incriminating evidence, given that the police often invent convincing "excuses" and that the exclusion of evidence frequently leads to the reintegration of criminals into society.[41]

In addition to the above reasons, Professor Gary Goodpaster of the University of California School of Law summarizes three others. First, if a police officer's conduct has not yet been found to be a violation of the law, then the police officer does not know that it is a violation of the law; and unless a court is able to find that the police officer has violated the law, the police officer is likely to commit such a violation again in a new situation. This means that the deterrent effect of a subsequent conviction is often not felt when the police discover inappropriate behavior. In this case, it would be wrong to exclude the evidence. This is because the offense is not deterred until after the offense has been identified. Secondly, as a practical matter, the rule of exclusion of unlawful evidence does not actually deter police officers from violating the law. This is because the police have other valued goals other than seeking criminals and especially maintaining social order. And when criminals are not found, the exclusion of illegal evidence has no deterrent effect. Moreover, the police often do not know the final verdict for the cases they handle. Third, the rule of excluding illegal evidence is a remedy only for those who are criminally charged. When the police do not care how the evidence they collect is used in subsequent proceedings, the rule of exclusion of illegal evidence does not deter the police from violating the law.[42]

4 Practical Approaches and Implications of Rethinking Deterrence Theory in The United States

The United States society not only in the theory of illegal evidence exclusion rule of deterrence function and its deterrence theory of deep reflection, and in the legislation and justice more and more restrict the application of illegal evidence exclusion rule. In-depth understanding of the United States of America for illegal evidence exclusion rule deterrent function of reflection on China in recent years in full swing to carry out the reform of illegal evidence exclusion rule has an important revelation significance.

4.1 U.S. Practical Approaches to Rethinking Deterrence Theory

As Prof. Gary Goodpaster points out, the exclusionary rule is the most controversial rule in criminal law.[43] The main reason why the rule of excluding illegal evidence has caused various controversies is that the rule contains almost all the important value conflicts in the field of criminal law, such as public interest and individual interest, state power and civil rights, punishment of crime and protection of human rights, substantive justice and procedural justice, truth and procedural dignity, as well as the interests of the defendant and the interests of the victim, and so on. From this point of view, the theoretical controversy about the exclusion of illegal evidence rules, such as the legitimacy of the dispute, it is better to say that the value of the conflict and the choice of the dispute. As early as the early 19th century, the famous British philosopher Jeremy Bentham had strongly questioned the exclusionary rule based on utilitarian philosophical thought. In his view, evidence is the cornerstone of justice, and excluding evidence is tantamount to excluding justice.[44] During the due process of law revolution, the U.S. Supreme Court was enthusiastic about the exclusionary rule of illegal evidence mainly because of the relentless pursuit of values such as due process and human rights protection by the Supreme Court headed by Justice Warren. As Professor James Tomkovicz of the University of Iowa College of Law has pointed out, in order to ensure that the risk of conviction of innocent people is minimized, we prefer to let some guilty people get away with the punishment they deserve.[45]

However, with the continuous rethinking of the exclusionary rule in all sectors of society, based on the uncertainty and limitations of the deterrent function, from the Warren Court to the Burger Court, and then from the Rehnquist Court to the Roberts Court, the U.S. Supreme Court has become more and more conservative in the application of the rule of exclusion of illegal evidence, and set up more and more exceptions to the rule of exclusion of illegal evidence. In particular, after conservative Justice John Glover Roberts became Chief Justice on September 29, 2005, he kicked off the U.S. Supreme Court's cautious application of the illegal evidence exclusionary rule, marked by the 2006 case of Hudson v. Michigan. In Hudson v. Michigan, Justice Scalia wrote the opinion arguing that the exclusionary rule leads to heavy societal costs, and that it can sometimes even lead to the indulgence of the guilty and the impunity of the dangerous. Accordingly, we have been cautious about expanding the application of the exclusionary rule and have repeatedly emphasized that the high cost of discovery for real and law enforcement purposes because of the exclusionary rule is a formidable obstacle to its application. Not only have we rejected indiscriminate application of the exclusionary rule, but we have also held that the exclusionary rule should be applied only when the remedial objective can be most effectively achieved, i.e., when the deterrent benefit outweighs the heavy social cost.[46] In view of this, the United States Supreme Court in that case declared that the exclusionary rule did not apply to evidence seized in violation of the "knock-and-announce" rule.[47] After Hudson, the U.S. Supreme Court significantly weakened the application of the exclusionary rule based on the 4th Amendment to the U.S. Federal Constitution in two more cases: Herring v. U.S. in 2009, which declared that only evidence obtained by the police in willful or grossly negligent violation of the 4th Amendment to the Constitution should be excluded[48]; In the 2011 case of Davis v. United States, it was declared that evidence obtained by the police should not be excluded if the police comply with binding judicial precedent at the time of the search, even if that precedent is later overruled.[49]

The United States has not only continuously restricted the application of the rule of exclusion of unlawful evidence in the administration of justice, but also weakened the scope of application of the rule of exclusion of unlawful evidence through legislation. The most typical performance is the United States Patriot Act on the impact of illegal evidence exclusion rules. In 2001 after the "911 incident", the U.S. government quickly passed the "patriot act". A significant feature of the Patriot Act is that the United States Government has greatly expanded the authority of law enforcement agencies in the name of dealing with terrorism. For example, under sections 209, 213 and 806 of the PATRIOT Act, the powers of arrest, search and seizure of federal law enforcement agencies have been expanded, so that, for example, in the event of suspicion of terrorist activity, federal law enforcement agencies may conduct warrantless searches, covert searches or warrantless arrests and seizures. Under sections 201, 206, 207, 214, 215, 216, 218, and 225 of the PATRIOT Act, not only are the procedures for federal law enforcement to apply wiretapping and surveillance more lenient, but the scope of application of federal law enforcement to wiretapping and surveillance has been greatly expanded. Under Sections 203, 210, 211, 301 through 330, 361, 504, 505, and 508 of the PATRIOT Act, federal law enforcement's investigative authority has been significantly expanded, such as by investigators sharing intercepted communications with other federal government officials, obtaining relevant information without judicial review, and by strong measures to enhance financial counterterrorism and disrupt the supply chain of terrorist funds, among other things. Under the continuous expansion of the investigative authority of federal law enforcement agencies, the USA PATRIOT Act not only seriously threatens citizens' rights to personal freedom and privacy, but also affects the normal operation of the rule of exclusion of unlawful evidence, resulting in the transformation of much of the unlawful evidence

that should have been excluded in accordance with the Constitutional Amendment to lawful evidence as a result of the expansion of the investigative authority, thus greatly narrowing the scope of the rule of exclusion of unlawful evidence.

4.2 Implications of U.S. Rethinking Deterrence Theory for China's Exclusionary Rule Reforms

In contrast to the shrinking trend of the exclusion of illegal evidence rule in the United States, China's exclusion of illegal evidence rule has seen the complete opposite as the concepts of procedural rule of law, procedural justice, and human rights protection have flourished. Although as early as 1996 after the revision of the criminal procedure law, the supreme people's court and the supreme people's procuratorate through the judicial interpretation of the preliminary establishment of the exclusion of illegal evidence rules, but from the point of view of the judicial practice, the exclusion of illegal evidence rules have not been implemented. And the theoretical community generally will be illegal evidence exclusion rules in name only to illegal evidence exclusion rules itself, such as the exclusion of the scope is too narrow, the lack of procedural safeguard rules can be operated, illegal methods of semantic ambiguity. Against this background, with the June 13, 2010 Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and other joint release of the "on the handling of criminal cases to exclude illegal evidence of a number of issues," as a symbol, China began to summarize the lessons learned from judicial practice, drawing on the success of the Western experience, and drawing on the theoretical results of the reform of the exclusion of illegal evidence rules on the basis of the fanfare. In particular, on the basis of fully absorbing this judicial interpretation, the Criminal Procedure Law amended in 2012 for the first time made more systematic provisions on the exclusion of illegal evidence rules from the legislative level. After the revision of the Criminal Procedure Law in 2012, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and others made more systematic and comprehensive provisions on the rules for the exclusion of illegal evidence through a series of judicial interpretations, such as the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence from Handling Criminal Cases and the Procedures for Excluding Illegal Evidence from Handling Criminal Cases in the People's Courts (for Trial Implementation).

Perhaps based on its deep hatred of illegal evidence-gathering behavior, or because of the atmosphere of public opinion in which the whole society is fighting against the same enemy, China has even shown a radical attitude beyond that of Western countries in the process of reforming the rule of exclusion of illegal evidence. For example, in the implementation of the trial of the centralism of the situation, the western countries of illegal evidence exclusion rule is not in the law explicitly requires the investigative organs and procuratorial organs in the pre-trial procedures in accordance with the requirements of the rule of exclusion of illegal evidence to exclude the corresponding illegal evidence, and the court is to decide whether or not to exclude the illegal evidence of the main body of the law.[50] However, in China's criminal proceedings, from pre-trial to trial procedures must apply the rule of exclusion of illegal evidence, the public prosecution and the three organs of the law are obliged to exclude illegal evidence that meets the conditions. Illegal evidence exclusion rules of different subjects determine the legal consequences of China's exclusion of illegal evidence is also more severe than in Western countries. Generally speaking, in the western countries, the judge exclude illegal evidence legal consequences usually just cannot be used as the basis for the decision, but does not prohibit it as the basis for prosecution. According to China's new Criminal Procedure Law, the legal consequences of excluding illegal evidence include not only not being able to serve as the basis for a court's judgment, but also not being able to serve as the basis for prosecutorial opinions and prosecution decisions. According to Article 67 of the 2012 Provisions

on Procedures for Handling Criminal Cases by Public Security Organs, Articles 65 and 66 of the 2012 Rules of Criminal Procedure of the People's Procuratorates (for Trial Implementation), and Articles 14 and 17 of the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases, illegal evidence that meets the conditions for exclusion shall not be used as the basis for even submitting a request for approval of an arrest, authorization or decision to arrest.

Although China has already formulated rules for excluding illegal evidence at the institutional level that are comparable to those of developed Western countries, and even more "radical" than those of developed Western countries in some aspects, the rules for excluding illegal evidence, on which all sectors of the society have pinned high hopes, are still difficult to become a powerful tool to curb the practice of extorting confessions by torture, as the theoretical circles or reformers have expected. Illegal evidence collection behavior of the sharp weapon. This is not only after the revision and refinement of illegal evidence exclusion rules in the technical still have many loopholes, but also in the impact of illegal evidence exclusion rules to implement the operating environment has not yet changed fundamentally. [51] Judicial practice in recent years, although more and more judges can start the illegal evidence exclusion procedures in accordance with the requirements of the defense, but the judge can really exclude the prosecution's illegal evidence is very rare. To a certain extent, after the reform of illegal evidence exclusion rules can be said to have not escaped the name of the embarrassing situation. And from the individual scholars of empirical research, after the reform of illegal evidence exclusion rules in judicial practice of the deterrent effect is still very limited. Under these circumstances, we cannot help but reflect on China's current tendency to overemphasize the exclusion of illegal evidence rule in the governance of procedural violations.

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In fact, from the reflection of the United States on the deterrent function of the rule of exclusion of illegal evidence, the theory of deterrence seems to be logically rigorous, but there are obvious flaws. The core of the deterrence theory is through the exclusion of illegal evidence, deprive the offender of the interests and weaken the offender's motivation to violate the law, so as to incentivize its future investigative activities in strict accordance with the law in the collection of evidence. This is obviously deterrence theory advocates wishful thinking logical reasoning, but in judicial practice is not very practical significance. Illegal evidence exclusion rule to play a deterrent effect of the logical premise is to exclude illegal evidence can really deprive the

investigators through illegal evidence obtained by the interests of behavior. On the surface, it seems that the investigators' investigative work is negatively evaluated by the court when the court excludes unlawful evidence, especially when the court consequently decides that the defendant is not guilty. If the investigating authorities take the final outcome of the criminal proceedings as the standard for evaluating the investigative work, the interests of the investigators may indeed be affected to some extent by the court's exclusion of illegal evidence. Under such circumstances, the rule of exclusion of illegal evidence may serve as a deterrent to investigators.

However, judging from judicial practice, the investigating authorities may be far more concerned about whether a case can be solved than whether a suspect can be convicted. A notable example of this is that, under China's system of separation of investigation and prosecution and its focus on the investigative process, ensuring that the court decides that a suspect or defendant is guilty is primarily the responsibility of the procuratorate, whereas the collection of evidence and the seizure of suspects are the interests of the investigators and the tasks they should perform.[52] This determines that investigators tend to take whether or not they have solved a case as the main indication of whether they have accomplished their mission, rather than whether or not the court has handed down a guilty verdict as the main indicator.[53] Obviously, in a situation where investigators take the solving of cases as their own duty and the court's acquittal does not have much impact on investigators, the exclusion of illegal evidence by the court does not in fact pose a substantial threat to the interests of investigators as one might have thought.[54] After all, the belated exclusion of illegal evidence can hardly carry the mission of depriving investigators of undue benefits when they ensure the detection of cases through illegal means so as to accomplish their mission and realize their interests. In this case, coupled with the exclusion of illegal evidence is very likely to damage the state, society and the innocent victims of the punishment of crime, rather than illegal evidence exclusion rule is the punishment of lawbreakers, it is more accurate to say that the innocent or law-abiding punishment. That being the case, it is difficult to expect that the rule of exclusion of illegal evidence can play a deterrent role for those investigators who only consider solving the case without caring about the outcome of the judgment.

In view of this, given the insurmountable theoretical limitations of the exclusionary rule, coupled with the poor practical results of the exclusionary rule, there is no need for China to place too much hope in the uncertainty of the exclusionary rule for the treatment of procedural violations. On the one hand, it is necessary for China to reform the current illegal evidence exclusion rule, which is so severe that it is difficult to implement, to appropriately raise the conditions for the application of the exclusionary rule, and to limit the application of the exclusionary rule to only those very serious procedural violations. On the other hand, China should strengthen the substantive sanctions for procedural violations, in order to maintain the dignity of the legal process and curb the occurrence of procedural violations by directly punishing the violators.

Reference

[1] Due to the lack of empirical research, Chinese scholars for illegal evidence exclusion rules, the vast majority of the study of comparative and transplantation of jurisprudence research ideas, take for granted that, drawing on the exclusionary rules of the western countries can be managed in China's torture confession and other procedural violations. In the author's opinion, for the exclusionary rules can play the expected effect, need to prove empirical research, and cannot rely entirely on logical analysis, not to hold the western countries so, China should also be so the attitude of the exclusionary rules of western countries lack of critical spirit. But regrettably, for this problem, so far no one has launched a convincing empirical research.

[2] See Wolf v. Colorado, 338 U.S. 25 (1949), pp.25-33.

[3] See Wolf v. Colorado, 338 U.S. 25 (1949), pp.42-43.

[4] See Wolf v. Colorado, 338 U.S. 25 (1949), p.44.

[5] See Elkins v. United States, 364 U.S. 206 (1960), p.217.

[6] See Mapp v. Ohio, 367 U.S. 643 (1961), p.656. In Stone v. Powell, Justice Powell of the U.S. Supreme Court also reiterated Justice Stewart's view in delivering his sentencing opinion. See Stone v. Powell, 428 U.S. 465 (1976), p.484.

[7] In Lustig v. United States, Justice Frankfurter created the silver platter doctrine. The central idea of the doctrine is that if evidence is obtained by state law enforcement without the involvement of federal authorities at any level and then turned over to federal officials, that evidence can still be presented to federal courts even if there was a Fourth Amendment violation in the collection process. See Lustig v. United States, 338 U.S. 74 (1949). It is clear that the silver platter doctrine has helped to promote greater cooperation between federal law enforcement officials and state law enforcement officials.

[8] See Mapp v. Ohio, 367 U.S. 643 (1961), pp.657-658.

[9] See United States v. Calandra, 414 U.S. 338 (1974), p.347.

[10] See Illinois v. Krull, 480 U.S. 340 (1987), p.347.

[11] See James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order, Oxford University Press, 2011, p.23.

[12] Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 37, No.4 (Summer 1970), pp.709-710.

[13] See United States v. Leon, 468 U.S. 897 (1984), p.953.

[14] Craig M. Bradley, The Failure of the Criminal Procedure Revolution, University of Pennsylvania Press, p.39.

[15] See Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 37, No.4 (Summer 1970), pp.710-712.

[16] See William J. Mertens & Silas Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Georgetown Law Journal, Vol.70 (1981), p.399.

[17] Potter Stewart, The Road to Mapp v. Ohio and beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, Columbia Law Review, Vol.83, No.6 (Oct., 1983), p.1400.

[18] In the 1974 Calandra case, Justice Brennan issued a dissenting opinion arguing that one of the goals of the unlawful evidence exclusionary rule was to reassure the people that the government would not benefit from unlawful conduct. See United States v. Calandra, 414 U.S. 338 (1974), p.357.

[19] James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order, Oxford University Press, 2011, p.21.

[20] See James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order, Oxford University Press, 2011, p.26.

[21] Peter Mirfield, Silence, Confessions and Improperly Obtained Evidence, Oxford University Press, 1997, p.20.

[22] Similarly, in Germany, which has one of the most sophisticated exclusionary rules in the civil law system, the deterrence theory is not widely accepted, although some scholars have argued that the exclusionary rule has a deterrent effect in terms of inducing discipline or deterring future offenses. Critics argue, first, that there are more direct ways to hold police accountable for violations, such as disciplinary measures, civil or criminal liability for unlawful deprivation of liberty or unlawful entry into a home. Second, the deterrent effect of the exclusionary rule is effective only for willful violations that are difficult to prove. Thirdly, the exclusion of evidence by the courts for the purpose of disciplining the police would be contrary to the theory underlying inquisitorial: in the German judicial system, evidence in criminal proceedings was not used by the public prosecutor as a means of winning a case, but was a necessary tool for the court to carry out its duty to ascertain the truth; consequently, the exclusion of evidence was not detrimental to the interests of the police or of the public prosecutor but to the public interest in obtaining fair and accurate judgments in criminal cases.

[23] See Terry v. Ohio, 392 U.S. 1 (1968), p.14.

[24] See Michigan v. Tucker - 417 U.S. 433 (1974), p.447. In Gates, Justice White also held that while it may be conceded that the exclusionary rule can deter some police misconduct, it is clear that the exclusionary rule has no deterrent effect when it is invoked to exclude evidence that was obtained

because the police reasonably believed that their conduct did not violate the Fourth Amendment. See Illinois v. Gates, 462 U.S. 213 (1983), p.260.

[25] See United States v. Janis, 428 U.S. 433 (1976), at n.22, p.450.

[26] See United States v. Leon, 468 U.S. 897 (1984), pp.918-919.

[27] See United States v. Leon, 468 U.S. 897 (1984), p.940.

[28] See United States v. Leon, 468 U.S. 897 (1984), p.943.

[29] See Myron W. Orfield, Jr., The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, The University of Chicago Law Review, Vol.54, No.3 (Summer, 1987), p.1017.

[30] Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 37, No.4 (Summer 1970), p.755.

[31] See Peter F. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, American Bar Foundation Research Journal, Vol.8, No.3 (Summer, 1983), pp.585-609.

[32] Report of the Comptroller General of the United States, Impact of the exclusionary Rule on Federal Criminal Prosecutions, Rep. No.CDG-79-45 (19 Apr. 1979).

[33] See National Institute of Justice, The Effects of the Exclusionary Rule, A Study in California, Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 1982, pp.10-18.

[34] See Thomas Y. Davies, A Hard Look at What We Know (And Still Need to Learn) about the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, American Bar Foundation Research Journal, Vol.8, No.3 (Summer, 1983), pp.619-621.

[35] See Faretta v. California, 422 U. S. 806 (1975), p.834.

[36] See United States v. Leon, 468 U.S. 897 (1984), pp.942-943.

[37] See Raymond A. Atkins and Paul H. Rubin, Effects of Criminal Procedure on Crime Rates: Mapping out the Consequences of the Exclusionary Rule, Journal of Law & Economics, Vol.46, No.1, 2003, pp.157-180.

[38] See Hohn W. Strong (ed.), McCormick on Evidence (5th edition), West Group, 1999, pp.245-246.

[39] See Akhil Reed Amar, Fourth Amendment First Principles, HARVARD LAW REVIEW, Vol.107, No.4 (1994), pp.785-800; Akhil Reed Amar, The Future of Constitutional Criminal Procedure, AMERICAN CRIMINAL LAW REVIEW, Vol.33 (1996), pp.1135-1137; Akhil Reed Amar, Against Exclusion, Harvard Journal of Law & Public Policy, Vol.20, No.2 (1997), pp.465-466.

[40] See Jeffrey Standen, The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct, BRIGHAM YOUNG UNIVERSITY LAW REVIEW, Vol.2000, p.1487.

[41] See Myron W. Orfield, Jr., The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, The University of Chicago Law Review, Vol.54, No.3 (Summer, 1987), pp.1022-1023.

[42] See GARY S. GOODPASTER, An Essay on Ending the Exclusionary Rule, THE HASTINGS LAW JOURNAL, Vol.33 (May, 1982), pp.1082-1084.

[43] GARY S. GOODPASTER, An Essay on Ending the Exclusionary Rule, THE HASTINGS LAW JOURNAL, Vol.33 (May, 1982), p.1065.

[44] Jeremy Bentham, Rationale of judicial evidence, specially applied to English practice (bk.9, ch.3), Published by Hunt and Clarke in London, 1827, p.490.

[45] James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order, Oxford University Press, 2011, p.xv.

[46] See Hudson v. Michigan, 547 U.S. 586 (2006), p.591.

[47] See Hudson v. Michigan, 547 U.S. 586 (2006), pp.586-602.

[48] See Herring v. United States, 555 U.S. 135 (2009), pp.135-148.

[49] See Davis v. United States, 131 S. Ct. 2419 (2011), pp.2419-2437.

[50] In western countries, although the investigating and prosecuting authorities may also consciously make some changes to the evidence submitted to the court according to the rule of exclusion of illegal evidence in the process of prosecution, the purpose of the investigating and prosecuting authorities is mainly based on the consideration of the quality of the prosecution, or in order to avoid the trouble of the prosecution activities due to the exclusion of illegal evidence by the court, not to fulfill the legal obligation of

exclusion of illegal evidence. The legal obligation to exclude illegal evidence.

[51] See Wang Chao, Rethinking on the exclusionary rule in china, euro-asian legal frontiers review, No.1 (Mar.,2013).

[52] Even in Western countries with more sophisticated criminal justice systems, where there is a plurality of interests and greater discretion, the police do not care as much as one might think about the final outcome of criminal adjudication. As Attorney General Donald points out, while the importance of convictions to the police is a prerequisite for the doctrine of deterrence, the goal of the police is not to convict suspects, but rather to seek to apprehend and remove the crime. See Donald V. Macdougall, The Exclusionary Rule and Its Alternatives——Remedies for Constitutional Violations in Canada and the United States, The Journal of Criminal Law and Criminology, Vol.76, No.3 (Autumn, 1985),p.639.

[53] Because of this, we often see the following phenomenon: when a major case is declared solved, especially in the local and even nationally important case is declared solved, the public security organs will then hold a celebration of the merits of the case, to solve the case of meritorious personnel for meritorious awards, rather than wait until the court ruled that the defendant is guilty and then rewarded to the investigators.

[54] It may be argued that, in order to achieve the goal of depriving offenders of undue benefits, we can use the outcome of the verdict as a criterion for the assessment of investigative work. However, in a situation where the court's acquittal decision depends on a variety of factors, it is not unproblematic to simply take the acquittal decision as an evaluation criterion for good or bad investigative work. What is more, given the unsatisfactory level of investigation, investigative strength, investigative quality, investigative equipment, investigative methods and investigative funding available to Chinese investigative authorities, investigative authorities have a high degree of tolerance for violations of the law by investigators.