

July 1980

## Intrusion, Exclusion, and Confusion State v. Helfrich: The Exclusionary Rule and Acts of Private Persons

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### Recommended Citation

Richard A. Reep, *Intrusion, Exclusion, and Confusion State v. Helfrich: The Exclusionary Rule and Acts of Private Persons*, 41 Mont. L. Rev. (1980).

Available at: <https://scholarship.law.umt.edu/mlr/vol41/iss2/4>

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# NOTE

## INTRUSION, EXCLUSION, AND CONFUSION

STATE V. HELFRICH:

THE EXCLUSIONARY RULE AND ACTS OF PRIVATE PERSONS

Richard A. Reep

Suspecting that marijuana is being cultivated, a woman surreptitiously enters her neighbor's garden, removes a leaf from a plant and turns it over to the county sheriff's office. A deputy investigates and, based upon his observations and the leaf, applies for and obtains a search warrant. Armed with the warrant the deputy enters the neighbor's garden and removes a quantity of what he believes to be marijuana. The neighbor is criminally charged but moves to suppress the evidence as tainted by an unconstitutional search and seizure. Must the evidence be suppressed?

The Montana Supreme Court faced this question in *State v. Helfrich*<sup>1</sup> and held that suppression was appropriate. Thus, Montana reaffirmed its unique position as the only state to apply the controversial exclusionary rule to evidence procured through acts of a private person. This note will examine the *Helfrich* decision in light of prior Montana case law, United States Supreme Court decisions and holdings from other states.

### I. THE DEVELOPMENT OF MONTANA'S EXCLUSIONARY RULE

Since *Weeks v. United States*,<sup>2</sup> the rule excluding evidence procured by an unreasonable search and seizure has been a well established, although controversial,<sup>3</sup> method of enforcing the Fourth Amendment to the United States Constitution.<sup>4</sup> The Court's two part rationale for the rule has been stated as deterrence of unconstitutional searches and seizures and maintenance of

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1. — Mont. —, 600 P.2d 816 (1979).

2. 232 U.S. 383 (1914).

3. One of the most vociferous opponents of the exclusionary rule during the Warren Court era was Circuit Judge [now Chief Justice] Warren Burger. See, e.g., *Killough v. United States*, 315 F.2d 241, 253 (D.C. Cir. 1962)(Burger, J., dissenting).

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

U.S. CONST. amend. IV.

judicial integrity.<sup>5</sup> Although the emphasis has changed,<sup>6</sup> these reasons are still recited as the basis of the rule.<sup>7</sup>

Six years after *Weeks*, the Supreme Court in *Burdeau v. McDowell*,<sup>8</sup> limited the application of the exclusionary rule to acts of the sovereign or its agents. Therefore, evidence procured by a private person was not subject to exclusion even if obtained in an unreasonable manner.<sup>9</sup>

In 1921 the Montana Supreme Court adopted both the exclusionary rule and the Supreme Court's rationale in *State ex rel. Samlin v. District Court*.<sup>10</sup> *Samlin* and subsequent cases made it clear that Montana's rule enforced the state's constitutional prohibition against unreasonable searches and seizures and as such was limited to state action.<sup>11</sup>

In 1971, *State v. Brecht*<sup>12</sup> gave a new look to the exclusionary rule in Montana. In *Brecht*, the court adopted the rationale set forth by the United States Supreme Court in *Katz v. United States*,<sup>13</sup> and stated that the right protected by a constitutional prohibition of unreasonable searches and seizures was the right of privacy.<sup>14</sup> However, the Montana court refused to limit the prohibition to acts of the sovereign or its agents and instead extended the application of the exclusionary rule to the act of a private person.<sup>15</sup>

In *Brecht* and subsequent cases the Montana Supreme Court has stated that because it was construing Montana's constitutional provision on search and seizure it would not be bound by the United States Supreme Court's version of the exclusionary rule.<sup>16</sup> Emphasizing both an independent and expanded application of the

5. See, e.g., *Weeks v. United States*, 232 U.S. 383, 392-93 (1914); *Wolf v. Colorado*, 338 U.S. 25, 31 (1949).

6. Early cases on the exclusionary rule emphasized the judicial integrity rationale while the modern court's focus is on the deterrent effect of the rule. Compare *Weeks v. United States*, 232 U.S. 383, 394 (1914) with *Stone v. Powell*, 428 U.S. 465, 484-86 (1976).

7. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656-59 (1961); *Calandra v. United States*, 414 U.S. 338, 347-48 (1974).

8. 256 U.S. 465 (1921).

9. *Id.* at 476.

10. 59 Mont. 600, 198 P. 362 (1921).

11. *Id.* at 609, 198 P. at 365; accord, *State ex rel. King v. District Court*, 70 Mont. 191, 196, 224 P. 862, 864 (1924); *State ex rel. Sadler v. District Court*, 70 Mont. 378, 389, 225 P. 1000, 1003 (1924).

12. 157 Mont. 264, 485 P.2d 47 (1971).

13. 389 U.S. 347 (1967).

14. *Brecht*, 157 Mont. at 270, 485 P.2d at 50.

15. *Id.* at 270-71, 485 P.2d at 51.

16. See, e.g., *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974).

exclusionary rule, *State v. Helfrich*<sup>17</sup> stands in marked contrast to recent Supreme Court decisions limiting the applicability of the exclusionary rule under the federal constitution.<sup>18</sup>

## II. STATE V. HELFRICH

### A. *The Facts*

Mildred Arnold had lived as neighbor to Richard and Janet Helfrich of Willow Creek, Montana, for several years. During the summer of 1978 Arnold observed from her garden activities on the Helfrich property which led her to suspect that the Helfrichs were raising marijuana. Arnold telephoned the sheriff's office and reported her observations and suspicions. A deputy was dispatched but after investigating and seeing no marijuana he closed the case.

Three days later Arnold entered the Helfrich property and removed a leaf from one of the plants she suspected to be marijuana. She turned the leaf over to the sheriff's office where it was identified as marijuana. Officers then proceeded to Willow Creek where they observed and photographed marijuana in Helfrich's garden. Based upon Arnold's testimony and evidence, as well as the officer's observations and photographs, a search warrant was issued.

On August 3, 1978, officers seized 392 plants alleged to be marijuana from the Helfrich garden. Helfrich was charged with criminal sale of dangerous drugs but the district court suppressed the evidence because of faulty probable cause.<sup>19</sup>

### B. *The Decision*

The court, with Justice Harrison dissenting,<sup>20</sup> held:

[T]he right of individual privacy explicitly guaranteed by the State Constitution is inviolate and the search and seizure provi-

17. \_\_\_ Mont. \_\_\_, 600 P.2d 816 (1979).

18. See, e.g., *Calandra v. United States*, 414 U.S. 338 (1974). The Court in *Calandra* adopted a balancing test and stated that the exclusionary rule would be applied only where its purpose would be "efficaciously served." *Id.* at 348. See also *Stone v. Powell*, 428 U.S. 465 (1976). The Court in *Stone* refused to grant habeas corpus relief to a state prisoner where the state had provided an opportunity for full and fair litigation of the issue and where the benefits of furthering Fourth Amendment protection were outweighed by the costs to the criminal system. *Id.* at 494-95.

19. In order to clarify the circumstances surrounding the incident, the facts are taken from the transcripts and findings of the district court as well as from the reported case.

20. Justice Harrison based his dissent on what he saw as an improper expansion of the exclusionary rule. Noting his dissent in both *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971) and *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974), Justice Harrison declined to join in what he described as an extension of the exclusionary rule "beyond any logical purpose." *Helfrich*, \_\_\_ Mont. at \_\_\_, 600 P.2d at 819 (Harrison, J., dissenting).

sions of Montana law apply to private individuals as well as law enforcement officers. Evidence obtained through illegal invasions of individual privacy are not to be admitted into evidence in a court of law of this State.<sup>21</sup>

The holding in *Helfrich* was based squarely on Montana's constitutional provisions on privacy<sup>22</sup> and search and seizure.<sup>23</sup> The court concluded that the sample of marijuana procured by Arnold was the only credible evidence presented in support of the search warrant. Since the sample had been obtained during an illegal trespass, the majority had little trouble finding that the trespass violated Helfrich's right to privacy. As a "fruit of an illegal invasion"<sup>24</sup> of that right the sample was inadmissible under Montana's search and seizure clause. Therefore, because Arnold's sample provided the only basis for the search warrant, the subsequent search and seizure was both illegal and unreasonable and the evidence seized had been properly excluded by the district court.

### C. *An Analysis*

The court's decision rests on three premises: (1) Montana's constitutional right of privacy prohibits invasions by private persons as well as the state; (2) an illegal trespass on another's property is an invasion of that person's right of privacy; and (3) where a private person violates another's right of privacy in procuring evidence of a crime, the proper remedy is exclusion of that evidence. The remainder of this note examines each of these premises separately.

#### 1. *Montana's constitutional right of privacy prohibits invasion by private persons as well as the state*

Although ten of the fifty states have express provisions for privacy in their constitutions,<sup>25</sup> only Montana has construed the right

21. *Id.* at \_\_\_, 600 P.2d at 819.

22. "Right of Privacy. The right of individual privacy is essential to the well being of free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10.

23. Searches and Seizures. The people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

MONT. CONST. art. II, § 11.

24. *Helfrich*, \_\_\_ Mont. at \_\_\_, 600 P.2d at 817.

25. ALAS. CONST. art. 1, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. I, § 12; HAWAII CONST. art. 1, § 5; ILL. CONST. art. 1, § 6; LA. CONST. art. 1, § 5;

as a prohibition applicable to acts of private persons. Of the other nine states having privacy provisions in their constitutions, Alaska, California, Washington, and Arizona are of most interest to Montana since each has a provision for privacy separate from its search and seizure provision. Both Washington and Arizona provide for protection of "private affairs"<sup>26</sup> in their constitutions. Interpretation of these provisions has been limited almost exclusively to matters involving search and seizure.<sup>27</sup> In no case has the prohibition been applied against a private person without a showing of state involvement, and in one Arizona case the court stated flatly that the constitutional prohibition applied only to state action.<sup>28</sup>

California and Alaska have expressly provided for the right of privacy in their constitutions.<sup>29</sup> California amended its section on enumerated inalienable rights to include privacy and in doing so clearly indicated that the right prohibited violations by private persons as well as the state.<sup>30</sup> However, no case in California has extended protection of the right beyond acts of the state or its agents. Alaska's provision for privacy is similar to Montana's, yet the Alaska courts have limited its application to state activities.<sup>31</sup>

Thus, it appears well settled in forty-nine states and under the United States Constitution that privacy, even where specifically provided for in the state's constitution, will be enforced only as a prohibition against acts of the sovereign or its agents.<sup>32</sup>

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MONT. CONST. art. II, § 10; S. C. CONST. art. 1, § 10; WASH. CONST. art. 1, § 7.

26. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7; ARIZ. CONST. art. II, § 8.

27. See generally Comment, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 633 (1977).

28. *Cluff v. Farmers Insurance Exchange*, 10 Ariz. App. 560, 460 P.2d 666, 669 (1969).

29. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art 1, § 1. "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALAS. CONST. art. 1, § 22.

30. The election brochure circulated when the amendment to include privacy was being voted on stated that "at present there are no effective restraints on the informative activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian." Election Brochure, Argument in Favor of Proposition 11.

31. See, e.g., *Allred v. State*, 554 P.2d 411, 416 (1976), *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 476 (1977). Although Alaska has limited the application of its right of privacy, the protection it provides against governmental intrusions far exceeds that given by the Montana court. See, e.g., *Ravin v. State*, 537 P.2d 494, 511 (1975) (holding that possession of marijuana by adults at home for personal use is constitutionally protected). Cf. *State ex rel. Zander v. District Court*, \_\_\_ Mont. \_\_\_, 591 P.2d 656, 660 (1979) (holding that the state's interest in protecting property was a compelling state interest sufficient to justify an officer's presence on the defendant's property and that officers subsequent seizure of marijuana discovered was reasonable).

32. The principle that the United States Constitution applies only to the sovereign or

The first indication that the Montana Supreme Court held a broader view of the right of privacy came in 1952 in *Welsh v. Roehm*.<sup>33</sup> *Welsh* was a tort action for damages resulting from a continuing trespass. Deciding that the defendant's continuing illegal presence constituted a violation of the plaintiff's right of privacy, the court allowed damages. However, the source of plaintiff's right of privacy is difficult to discern from the decision since the court's rationale ranged from a common law concept of privacy<sup>34</sup> to citation of decisions based on the United States Constitution.<sup>35</sup> Nevertheless, nineteen years later in *State v. Brecht*,<sup>36</sup> *Welsh* was cited as establishing a right of privacy based on the Montana Constitution and enforceable against a private person.<sup>37</sup>

In *Brecht*, a man telephoned his wife and threatened to shoot her. His wife's sister, listening in on another extension, overheard the conversation. When the wife was shot and killed a short time later the district court allowed the sister to testify as to what she overheard. The supreme court reversed. Reasoning that Brecht's right of privacy was protected under the search and seizure provisions of both the state and federal constitutions, the court held that evidence of Brecht's telephone conversation with his wife had been procured in violation of that right and as such was inadmissible under the exclusionary rule. Refusing to distinguish between state and private action,<sup>38</sup> the court cited *Katz v. United States*<sup>39</sup> and *Welsh v. Roehm*<sup>40</sup> as support for a general right of privacy in the federal and state constitutions.

The court's reliance on *Katz* is clearly misplaced. *Katz* explicitly limits the application of the right of privacy under the Fourth

its agents has long been recognized. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967).

[T]he Fourth Amendment cannot be translated into a general constitutional right to privacy. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states. [Citations and footnotes omitted].

*Id.* at 350-51.

33. 125 Mont. 517, 241 P.2d 816 (1952).

34. *Id.* at 523, 241 P.2d at 819.

35. *Id.*

36. 157 Mont. 264, 485 P.2d 47 (1971).

37. *Id.* at 270, 485 P.2d at 50-51.

38. Addressing the issue of enforcement of the right against private persons as well as the state, the court stated: "To distinguish between classes of violators is tantamount to destruction of the right itself." *Brecht*, 157 Mont. at 270, 485 P.2d at 51.

39. 389 U.S. 347 (1967).

40. 125 Mont. 517, 241 P.2d 816 (1952).

Amendment to governmental intrusions.<sup>41</sup> Likewise, *Welsh* provides a tenuous basis for a general right of privacy. As a tort action the basis of the right was never firmly established. Furthermore, the court in *Brecht* simply overlooked the fact that the privacy issue in *Welsh* arose only as a basis for extended damages after a trespass was found. *Brecht* attempts to transform a basis for a remedial tort action into a constitutional prohibition.

Roundly criticized for its decision in *Brecht*,<sup>42</sup> the court offered a more complete explanation and justification of the *Brecht* holding in *State v. Coburn*.<sup>43</sup> Like *Brecht*, *Coburn* involved evidence procured by a private person and once again the court held that suppression was appropriate.<sup>44</sup> Although the 1972 Montana Constitution was in effect at the time *Coburn* was decided, the court paid little attention to its privacy provision. Instead, the court focused on what it felt was the more liberal interpretation of the United States Constitution under *Katz v. United States*<sup>45</sup> and *Elkins v. United States*.<sup>46</sup> Neither of these cases, however, applies the exclusionary rule to evidence procured through acts of a private person.

The applicability of Montana's privacy provision in the 1972 Montana Constitution was finally addressed in *State v. Helfrich*. The court cited *Brecht* for its application of the right of privacy under the 1889 Montana Constitution to both private and governmental action and then began an analysis of the 1972 Constitutional Convention transcripts. Seizing on two paragraphs from the transcripts, the court concluded that the framers of the constitution intended that the right of privacy should protect persons against both governmental and private violations.<sup>47</sup>

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41. See note 32 *supra*.

42. See, e.g., Note, *State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule?*, 34 MONT. L. REV. 187 (1973); Elison, *Criminal Procedure-Montana Law and the Federal Impact*, 38 MONT. L. REV. 27, 46-47 (1977).

43. 165 Mont. 488, 530 P.2d 442 (1974).

44. In *Coburn*, a restaurant manager was informed that an employee had marijuana in his coat pocket. The manager contacted the police and discussed the problem. Immediately after the discussion the manager seized the marijuana from the employee's coat and turned it over to the police. Noting the manager's association and cooperation with the police prior to the seizure, the court held that sufficient facts had been shown to exclude the evidence under either the "state action" doctrine or the rationale of the *Brecht* case. *Coburn*, 165 Mont. at 505, 530 P.2d at 451.

45. 389 U.S. 347 (1967).

46. 364 U.S. 206 (1960).

47. The first paragraph was quoted in the opinion as follows:

Certainly, back in 1776, 1789, when they developed our bill of rights, the search and seizure provisions were enough, when a man's home was his castle and the state could not intrude upon this home without the procuring of a search warrant

It is undeniable that the portions of the transcripts cited by the court in *Helfrich* indicate a preference for a broad application of the right of privacy. However, when the transcripts are read as a whole the court's interpretation loses its cogency. Repeated references in the transcripts to the relationship between private persons and the state and the delegates' citation of a leading United States Supreme Court decision on privacy and governmental intrusions, compel an interpretation contrary to that of the court in *Helfrich*.<sup>48</sup>

By interpreting Montana's constitutional right of privacy as a prohibition against private as well as state action, the court took a position contrary to the courts of other states, the United States Supreme Court and, arguably, the intention of the framers of Montana's constitution.

2. *An illegal trespass on another's property is an invasion of that person's right of privacy.*

Any right of privacy must be defined by some limits. Historically, property principles were called upon as a basis for finding

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with probable cause being stated before a magistrate and a search warrant being issued. No other protection was necessary and this certainly was the greatest amount of protection that any free society has given its individuals. In that type of society, of course, the neighbor was maybe three or four miles away. There was no real infringement upon the individual and his right of privacy. However, today we have observed an increasingly complex society and we know our area of privacy has decreased, decreased and decreased. . . .

Helfrich, \_\_\_ Mont. at \_\_\_, 600 P.2d at 818, *citing* Transcript of the Montana Constitutional Convention 5182. The second paragraph was quoted as follows:

It isn't only a careless government that has this power to pry, political organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. . . .

Helfrich, \_\_\_ Mont. at \_\_\_, 600 P.2d 818, *citing* Transcript of the Montana Constitutional Convention 5182.

48. The court omitted that portion of the statement which cited *Griswold v. United States*, 381 U.S. 479 (1965). The balance of the delegates' statement reported in part by the court in *Helfrich* (note 44 *supra*) reads as follows:

[I]t produces what I would call a semi-permeable wall of separation between *individuals and state*; just as the wall of separation between church and state is absolute, the wall of separation we are proposing with this section would be semi-permeable. That is, as a participating member of society we all recognize that the state must come into our private lives at some point, but what it says is, don't come into our private lives unless you have a good reason for being there. We feel that this, *as a mandate to our government*, would cause a complete re-examination and guarantee our individual citizens of Montana this very important right . . . . [emphasis added]

Transcript of the Montana Constitutional Convention 5181-82. The second paragraph set forth in note 44 *supra* was actually the delegate reading from a newspaper editorial which supported an expanded right of privacy to meet individual needs as "governmental frustrations and controls expanded." Transcript of the Montana Constitutional Convention 5183.

and defining these limits. The modern approach, taken by both state and federal courts, is the principle adopted in *Katz v. United States*. *Katz* stated that the right of privacy protects people, not places.<sup>49</sup> Montana's reliance upon this principle is expressed in several cases, but perhaps the most definitive statement is found in *State v. Charvat*.<sup>50</sup> The court in *Charvat* concluded that where an individual's subjective expectations of privacy were objectively reasonable the right of privacy existed.<sup>51</sup> Despite the adoption of this more liberal test, the court upheld a warrantless seizure of marijuana from a field even though the marijuana was not visible from outside the defendant's property. The court reasoned that even if the defendant had subjective expectations of privacy they were not objectively reasonable under the "open fields"<sup>52</sup> exception. Thus, in *Charvat*, a trespass by police did not result in a violation of the defendant's right to privacy.

The open fields doctrine should not be the basis of an exception to the right of privacy. The open fields doctrine was formulated in 1924<sup>53</sup> when the property principles of constitutionally protected areas provided the limits of Fourth Amendment protection. This concept was repudiated in *Katz*. However, even though property principles can no longer be used to *limit* Fourth Amendment protection it does not follow that a person's reliance on property principles, when forming an expectation of privacy, is either subjectively or objectively unreasonable. Reliance on state and public respect for property may, in some circumstances, be viewed as a basis for a reasonable expectation of privacy.<sup>54</sup> It may be that an open field is not a place where one can reasonably expect privacy, but the *Katz* test should be applied rather than rejecting the privacy claim on the basis of an exception founded in property principles.

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49. *Katz*, 389 U.S. at 512.

50. — Mont. —, 573 P.2d 660 (1978).

51. *Id.* at —, 573 P.2d at 663.

52. The "open fields" doctrine was first announced in *Hester v. United States*, 265 U.S. 57 (1924). In *Hester*, the Court held that the Fourth Amendment extends only to "persons, houses, papers, and effects" and refused to extend the protection to open fields. *Id.* at 59.

53. See note 52 *supra*.

54. For instance, where a person's land is conspicuously posted, privacy could be both subjectively and objectively reasonable if consideration is given to Montana's statutory prohibition against entry. MONTANA CODE ANNOTATED §§ 46-6-201, -203 (1979). For an excellent discussion of the United States Supreme Court's use of property principles for limiting, extending, and defining the Fourth Amendment's right of privacy, see O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENGLAND L. REV. 662, 704-37 (1978).

To state that an illegal trespass violates a right of privacy also confuses the right of privacy with property principles. The question should be whether or not the person expected privacy, and if so, whether that expectation was objectively reasonable. Thus, not all trespasses are invasions of privacy just as not all invasions of privacy are trespasses. The two issues are based on separate principles. If privacy is the basis for excluding unreasonably obtained evidence then the question of trespass is, and must remain, only a collateral issue.

3. *Where a private person violates another's right of privacy in procuring evidence of a crime, the proper remedy is exclusion of that evidence.*

The historical development and application of the exclusionary rule indicates that both the United States Supreme Court and the Montana Supreme Court regard privacy as the right protected by search and seizure provisions. They also agree that the protection is indirect in that exclusion of evidence unconstitutionally obtained will not repair the harm done but only tends to deter future violations. They disagree, however, upon the exclusionary rule's applicability to unreasonable searches and seizures by a private person. This disagreement and Montana's unique application of the rule leads to some confusion as to what the court actually sees as the reason behind the rule.

In *Helfrich*, evidence was excluded without comment on the deterrent value of the exclusion. In cases where the police violate the defendant's privacy, exclusion of the evidence should deter future violations. But even in those cases the court has felt compelled to comment on deterrence and at times has rejected the rule where deterrence was minimal.<sup>55</sup> In *Helfrich*, the apparent automatic exclusion of evidence upon finding a violation of the defendant's right of privacy, invites speculation as to what the court perceives to be the status of the rule and its deterrent value.

Automatic application of the rule upon finding a constitutional violation tends to treat the rule either as a means of repairing a constitutional harm or as a constitutional mandate. The rule was not designed to repair.<sup>56</sup> It offers no reparation in the case of

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55. In *State v. Thorsness*, 165 Mont. 321, 528 P.2d 692 (1974), the court refused to apply the exclusionary rule where the deterrent value would be minimal. *Thorsness* involved a probation revocation action but indicated a willingness of the court to apply the balancing test developed by the Burger Court. *Id.* at 326, 528 P.2d at 695.

56. The Montana Supreme Court states this proposition in *State v. Thorsness*, 165 Mont. 321, 326, 528 P.2d 692, 695 (1974).

an unreasonable search and seizure which yields no criminal evidence. The rule's remedy is limited to a person who has both committed a crime and been the object of an unreasonable search and seizure. A rule whose value is limited to repairing harms done to this class of persons is irrational.

The exclusionary rule is not mandated by either the federal or state constitutions.<sup>57</sup> Rather, it is a judicially developed rule of evidence designed to prevent constitutional violations. Therefore, where the rule presents no deterrent value it should have no constitutional imperative.<sup>58</sup>

The rule has only minimal deterrent value when applied to private persons.<sup>59</sup> It deters by rendering the fruits of an unreasonable search and seizure inadmissible as evidence. Removal of this incentive should, logically, reduce violations and therefore benefit all who can claim a right of privacy. However, reduced violations will result only if the potential violators are aware of the rule. Aside from the news media there exists no effective method of informing the general public of the rule. Even where the public becomes aware of the rule they may not appreciate or understand its ultimate value and simply ignore it.

A final justification for the automatic application of the exclusionary rule is the argument for judicial integrity. That is, the courts should not sanction the use of evidence which was illegally obtained. The philosophical purity of this argument is generally outweighed by the practical problem of freeing a criminal in the face of evidence of his crime while society is forced to bear the costs of both the procurer's and the criminal's illegal activity. Thus, modern courts have largely ignored this argument and relied upon deterrence to justify the rule.<sup>60</sup>

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57. The court stated as much in *State v. Coburn*, 165 Mont. 488, 499, 530 P.2d 442, 448 (1974):

Concerning the exclusionary rule itself, it would be well to consider first that the "exclusionary rule" is a court adopted rule resting on the "rule making" and "supervisory power" of the Supreme Court over the other courts and has no roots in the constitution or statutes of the state or federal government.

58. This is the position taken by the Burger Court when it adopted its balancing test in *Calandra*, 414 U.S. 338, 354 (1974) (refusing to extend the rule to grand jury proceedings where the deterrent value to police conduct was outweighed by the costs to the system).

59. A second argument for application or adoption of the exclusionary rule is "judicial integrity." That argument is discussed at the end of this section in this note.

60. See, e.g., *Calandra v. United States*, 414 U.S. 338, 360 (1974); *State v. Thorsness*, 165 Mont. 321, 528 P.2d 692 (1974). "Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectually available way — by removing the incentive to disregard it." *Id.* at 326, 528 P.2d at 695, citing *Elkins v. United States*, 364 U.S. 206, 217 (1960).

## III. CONCLUSION

*State v. Helfrich* stands as the court's second opportunity in the past five years to correct its misapplication of the exclusionary rule. It now seems certain that the rule applies to all searches and seizures by private persons where the defendant's right of privacy is violated. Less certain, however, is the court's reason for clinging to this broad application. Neither the historical foundation of the rule nor the modern concept of the right of privacy supports such an automatic and sweeping application.

Deterrence, the major justification for the rule, was never addressed in *Helfrich*. Instead, the court automatically applied the rule after deciding that the defendant's right of privacy had been violated. The court's application of the exclusionary rule in *Helfrich* sets a confusing standard and threatens to elevate the rule to a constitutional imperative, a status which it has never before held.<sup>61</sup> Constitutional status may prevent the demise of the controversial rule should a more workable method be devised by the legislature for protecting Fourth Amendment rights.

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61. See note 57 *supra*.