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The 'New' Exclusionary Rule Debate: From 'Still Preoccupied with 1985' to 'Virtual Deterrence'

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**THE “NEW” EXCLUSIONARY RULE DEBATE:
FROM “STILL PREOCCUPIED WITH 1985” TO
“VIRTUAL DETERRENCE”**

*Donald A. Dripps**

*Way before Nirvana
There was U2 and Blondie
And music still on MTV
Her two kids in high school
They tell her that she’s uncool
Cause she’s still preoccupied
With 19, 19, 1985¹*

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INTRODUCTION

The exclusionary rule for evidence found in violation of the Fourth Amendment is, again, in play. In *Hudson v. Michigan*,² the Court held that the exclusionary rule does not apply to violations of the Fourth Amendment's knock-and-announce requirement. This by itself was not surprising. Justice Scalia's majority opinion, however, joined by Chief Justice Roberts, Justice Thomas, Justice Kennedy, and Justice Alito, contained language, gratuitous to the result, lamenting the "substantial social costs" of the exclusionary rule, questioning the need for the "massive remedy" of exclusion,³ and claiming the effectiveness of alternative remedies. The phrase "substantial social costs" appears three times in the majority opinion.⁴ Justice Breyer's stout dissent, joined by Justices Stevens, Souter, and Ginsburg, replied that exclusion would deter violations⁵ and threw cold water on the claim of effective alternatives.⁶ Justice Kennedy, who joined in the majority, filed a concurrence including the assertion that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."⁷ He was the only justice to express this particular view.

2. 547 U.S. 586 (2006).

3. *Id.* at 595 ("In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule . . .").

4. *Id.* at 591, 594, 596.

5. *Id.* at 610 (Breyer, J., dissenting) ("[T]he need for deterrence—the critical factor driving this Court's Fourth Amendment cases for close to a century—argues with at least comparable strength for evidentiary exclusion here.").

6. *Id.* (Although reported violations are "legion," "the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation").

7. *Id.* at 603 (Kennedy, J., concurring).

Just this January, in *Herring v. United States*,⁸ the justices divided into the same blocs. This time, however, Justice Ginsburg's dissent raised the ante, by arguing that the familiar cost-benefit approach to applying the exclusionary rule is misguided.⁹ For the first time since Justice Brennan left the Court, members of the Court appealed to broader justifications for exclusion, including concerns for judicial integrity, judicial review, and long-run and indirect influences on official behavior.¹⁰

The ideas in this "new" debate, however, are about as fresh as the musty air of an antique shop. The Justices have added nothing to the stock arguments of their predecessors on the Burger Court. I find myself wearing the remains of my hair long, putting on wide ties, reading dismal economic news, and seeing in the latest pages of the Supreme Court Reporter the *United States v. Leon* decision¹¹ being countered by appeals to 1983 law review articles and prior dissenting opinions by Justice Brennan.¹² It could be 1985 all over again.

This Article has two objectives. The first is to discredit both the majority and dissenting positions in *Herring*. I contend that the loss of evidence is a cost of the exclusionary rule, as distinct from the Fourth Amendment, only in a precise technical sense. It is conceptually possible that the rule might deter borderline but legal police activity.¹³ While that cost is conceptually possible, the empirical evidence does not suggest that it is significant.¹⁴

Notions of a right to exclude illegally-obtained evidence based on unitary-transaction theories or judicial integrity are equally unsound.¹⁵ They rest on a conception of substantive Fourth Amendment rights that goes beyond personal security and informational privacy to include a constitutional right to private crime. Moreover, right-to-exclude accounts indeed

8. 129 S. Ct. 695 (2009).

9. See *id.* at 707 (Ginsburg, J., dissenting).

10. *Id.*

11. The *Herring* majority cites *United States v. Leon*, 468 U.S. 897 (1984), seventeen times. See *Herring*, 129 S. Ct. at 699 (twice); *id.* at 700 (five times, counting the citation in footnote 2); *id.* at 701 (four times); *id.* at 703 (thrice); *id.* at 703-04 (once); *id.* at 704 (twice).

12. See *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (citing *United States v. Callandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)); Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600 (1983); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

13. See *infra* Part II.A-B.

14. See *infra* Part II.C.

15. See *infra* Part III.

threaten the good-faith immunity defense in tort,¹⁶ with the attendant risk of overdeterrence. If Justice Ginsburg invoked the Brandeis and Brennan views of exclusion because she believes that the cost-benefit cases have shortchanged deterrence (a correct apprehension), the *Herring* dissent is less than candid, as well as less than logical—a red *Herring*, as it were.

My second objective is more constructive. I have previously suggested the suppression of evidence contingent on the failure to pay damages.¹⁷ If damage actions really were a good remedy for typical violations, I would stand by this idea. Assessing the damages, however, is difficult and dangerous. If damages are set too high, they will overdeter; if set too low, they will underdeter. Using the administrative machinery of the motion to translate suppression into damages, therefore, takes an interesting road to the wrong destination.

Whether achieved by suppression or by damages, deterrence operates by giving the police incentives to prevent future violations. There are different administrative means to this end. If the violation is negligent, retraining the officer or instituting more intensive training programs for the wider force are plausible options. If the violation is reckless or intentional, discipline as well as retraining may be appropriate.

If the point of exclusion is deterrence, why exclude now and hope the police take preventive action later? Why not, in other words, suppress tainted evidence, then give the prosecution the opportunity to prove the precise, concrete steps the police department has taken to prevent recurrence? If the court finds the corrective action adequate, the evidence could be received; if not, it would be suppressed.

Part I locates the current controversy in historical context, a prelude to Part II's attack on the *Herring* majority's concept of the exclusionary rule's costs and Part III's attack on the *Herring* dissent's turn to theories other than deterrence. Part IV makes the case for my revised contingent exclusionary rule, an approach I call, in keeping with my plea for modernity, "virtual deterrence."

16. For cases recognizing the defense, see, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987) (discussing qualified immunity for actions based on *Bivens*), and *Malley v. Briggs*, 475 U.S. 335 (1986) (discussing qualified immunity against actions under 42 U.S.C. § 1983).

17. Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001).

I. BACK TO THE FUTURE?

A. The (Unhappy) History of the Exclusionary Rule

The doctrinal history of the exclusionary rule is well known and can be briefly summarized. *Weeks v. United States* permitted a pretrial motion for the return of property in order to prevent the government's use of incriminating evidence against the search victim.¹⁸ *Weeks* made sense given the dual doctrines of *Boyd v. United States*: the Fourth Amendment forbids the seizure of evidence other than contraband, fruits, and instrumentalities, and the Fifth Amendment forbids the use of the accused's property to prove his guilt at trial.¹⁹ *Silverthorne Lumber Co. v. United States* retained the exclusionary rule despite a corporation's lack of Fifth Amendment rights,²⁰ and *Agnello v. United States* blessed the suppression of contraband seized in violation of the Fourth.²¹

Some states followed *Weeks* and some states did not. In *Wolf v. Colorado* the Court held that the Fourth Amendment applies to the states through Fourteenth Amendment due process, but refused to apply the exclusionary remedy on unwilling states.²² Twelve years later, *Mapp v. Ohio* reversed the latter holding.²³

The *Mapp* opinion faithfully reflected the doctrinal incoherence of the federal exclusionary rule cases, which remained premised on property rights and the self-incrimination privilege, but often disregarded these premises to reach results calculated to regulate federal law-enforcement agencies, as in *Agnello*. *Mapp* cited the ineffectiveness of other remedies,²⁴ the need to deter misconduct,²⁵ and "the imperative of judicial integrity."²⁶ Only Justice Black, who supplied the fifth vote, worked from the *Boyd* doctrine to reach the *Mapp* result.²⁷ Since *Twining v. New Jersey*²⁸ and *Adam-*

18. 232 U.S. 383 (1914).

19. 116 U.S. 616 (1886).

20. 251 U.S. 385 (1920).

21. 269 U.S. 20 (1925) (excluding cocaine discovered in a warrantless search of the defendant's home; the defendant disclaimed possession of the cocaine).

22. 338 U.S. 25 (1949).

23. 367 U.S. 643 (1961).

24. *Id.* at 652-53 (noting the "obvious futility of relegating the Fourth Amendment to the protection of other remedies").

25. *Id.* at 656 ("Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (citation omitted)).

26. *Id.* at 659.

27. *Id.* at 661 (Black, J., concurring) (questioning pure Fourth Amendment theory but embracing that the use at trial of evidence obtained in violation of the Fourth Amendment violates the Fifth Amendment).

28. 320 U.S. 362 (1943).

son v. California,²⁹—holding that the Fifth Amendment self-incrimination privilege did not apply to the states through the Fourteenth Amendment—were not yet overruled by *Malloy v. Hogan*,³⁰ this is perhaps not surprising.

Subsequent cases made clear the salience of the deterrence rationale. *Linkletter v. Walker*³¹ refused to apply *Mapp* retroactively, a result consistent with the deterrence theory. *Alderman v. United States*³² retained the standing requirement, a seeming retention of the Fifth Amendment theory, but the opinion took pains to stress that the search victim's right to exclude provided adequate deterrence of Fourth Amendment violations.³³

Through *Alderman*, the history of the exclusionary rule tracks the history of the Fourth Amendment generally. The early federal Fourth Amendment cases reflected an “atomistic” conception of the Amendment as protecting individual entitlements to property, privacy, and personal security.³⁴ Searches were defined as tortious trespasses upon private property interests;³⁵ executive-branch agents could not engage in such trespassory activity without a judicial warrant;³⁶ warrants by their terms could be issued only with probable cause and the agents logically could have no greater power without judicial authorization than with it. Even when authorized by a valid warrant, the seizure of any property other than fruits, instrumentalities, or contraband was held to violate the Fourth Amendment.³⁷ Exclusion, ex-

28. 211 U.S. 78 (1908) (finding that the Fourteenth Amendment does not create a right against self-incrimination compelled by the states).

29. 332 U.S. 46 (1947) (affirming that the Fourteenth Amendment does not create a right against self-incrimination compelled by the states).

30. 378 U.S. 1 (1964) (finding that the Fourteenth Amendment *does* create a right against self-incrimination compelled by the states).

31. 381 U.S. 618 (1965) (holding that *Mapp* did not apply to cases that had become final on direct review at the time of that decision).

32. 394 U.S. 165 (1969).

33. *See id.* at 174-75 (“The deterrent values of preventing the incrimination of those whose rights the police have violated” is an adequate remedy; further deterrence from third-party standing is unjustified).

34. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

35. *See, e.g.,* *Olmstead v. United States*, 277 U.S. 438 (1928) (finding that wiretapping, although prohibited by state statute, does not constitute a search because there is no physical trespass).

36. *See, e.g.,* *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (holding that an unlawful search of corporate premises violates the Fourth Amendment).

37. *See* *Gouled v. United States*, 255 U.S. 298, 309 (1921) (Under *Boyd* and *Weeks*, search warrants “may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.” (citing *Boyd v. United States*, 116 U.S. 623, 624 (1886))).

emplified by *Weeks*, aimed to restore the *status quo ante* when the government’s agents had broken into private spheres without lawful authority.

The logic of this atomistic perspective, however, often yielded to the “regulatory perspective,” the perceived necessity to discourage lawless actions by the police, even when those actions could not be equated with tortious invasions of private property rights. During the Prohibition Era, contraband booze could be the subject of suppression and even of return.³⁸ This surely reflected some degree of sentiment for nullification, but it also reflected a quite principled concern that if contraband could *not* be suppressed there would be no effective deterrent to unconstitutional searches.

The Warren Court moved further along the regulatory path by classifying electronic eavesdropping without trespass to the suspect as a “search,”³⁹ and by rejecting the mere-evidence rule that had been the premise for search and seizure law since *Entick v. Carrington*.⁴⁰ In *Terry v. Ohio*, the Court treated coercive stop-and-frisk practices—tortious *prima facie*—as seizures and searches that could be justified by less than probable cause, thus within the power of the police, even though the text of the Constitution gives judges no explicit power to authorize them.⁴¹

Linkletter set the stage for a full and candid turn to a regulatory approach, rooted in deterrence, to the exclusionary rule. Doctrinal development, however, coincided with political change. Reflecting the electoral sentiment of the 1970s, new justices showed more concern for law enforcement. *United States v. Calandra* embraced a purely deterrent view of the exclusionary rule, expressive of a new Supreme Court majority more sympathetic to law enforcement than the last.⁴² Suppression is costly and must be justified by deterrent benefits, and an exception should be created whenever those benefits are not clear. Subsequent cases took this approach repeatedly. In only one case—*James v. Illinois*⁴³—did the Supreme Court’s balancing test incline in favor of the defense. In more than half a

38. See, e.g., *Giles v. United States*, 284 F. 208 (1st Cir. 1922) (ordering that liquor seized under a defective warrant be excluded from evidence and returned to the defendant).

39. *Katz v. United States*, 389 U.S. 347 (1967) (finding the use of a microphone planted on a telephone booth, owned by a telephone company, to be a “search” of the suspect when used to eavesdrop on the suspect’s telephone conversation).

40. *Warden v. Hayden*, 387 U.S. 294 (1967) (upholding seizure of “mere evidence” including clothes worn by the suspect during the alleged offense).

41. 392 U.S. 1 (1968).

42. 414 U.S. 338 (1974) (holding that a grand jury witness, given transactional immunity, could be compelled to answer questions based on evidence that the witness had previously successfully moved to suppress against himself on grounds of unlawful search).

43. 493 U.S. 307 (1990) (holding that the defendant’s statement, obtained while he was illegally arrested, was inadmissible to impeach testimony of X, a third-party defense witness).

dozen others (*United States v. Janis*,⁴⁴ *Stone v. Powell*,⁴⁵ *United States v. Havens*,⁴⁶ *United States v. Leon*,⁴⁷ *Massachusetts v. Sheppard*,⁴⁸ *Illinois v. Krull*,⁴⁹ and *Arizona v. Evans*⁵⁰), the Court approved government use of tainted evidence.

The majority opinions in these cases stubbornly refused to answer two powerful opposing arguments. The first is that the Fourth Amendment prohibits some searches that would discover evidence of serious crimes, so that the loss of evidence attends any effective deterrent of Fourth Amendment violations. The description of lost evidence as a “cost” was therefore hostile not to the exclusionary remedy, but to the underlying Fourth Amendment right, one the justices in the majority did not deride and which, in any event, they were sworn to uphold.

The second argument is that the Court’s opinions gave no criteria for determining when deterrence was expected to be adequate and when it was not. When confronted with case-specific reasons to predict positive incentives for constitutional violations, the stock rejoinder was that these concerns were “speculative.”⁵¹

44. 428 U.S. 433 (1976) (holding that the exclusionary rule does not apply in a civil suit by the government for unpaid taxes in the absence of any proof of federal participation in illegality).

45. 428 U.S. 465 (1976) (holding that state prisoners may not relitigate suppression motions on petitions for federal habeas where the state had provided the opportunity for full and fair litigation of the Fourth Amendment claim).

46. 446 U.S. 620 (1980) (holding that the impeachment exception to the exclusionary rule extends to contradiction of testimony elicited by the prosecution from the witness-defendant on cross-examination).

47. 468 U.S. 897 (1984) (holding that evidence found pursuant to a warrant issued despite the failure of the application to establish probable cause will be admitted absent perjury in the supporting affidavit, partisanship by the issuing judge, or patent inadequacy of an application that well-trained police would recognize).

48. 468 U.S. 981 (1984) (holding admissible evidence of homicide discovered by search authorized by a modified form narcotics warrant that was not modified to particularly describe the evidence sought, but which was particularly described in the officer’s warrant application).

49. 480 U.S. 340 (1987) (holding the fruits of search authorized by an unconstitutional state statute admissible where the law enforcement officer’s reliance on the statute was objectively reasonable).

50. 514 U.S. 1 (1995) (holding admissible fruits of search incident to arrest based on an erroneous judicially-maintained record of outstanding warrant).

51. *See, e.g., Leon*, 468 U.S. at 918 (exclusion might encourage police to scrutinize applications and warrants to prevent judicial errors, but “we find such arguments speculative”); *Stone v. Powell*, 428 U.S. 465, 487-88 (1976) (“We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.” (quoting *United States v. Calandra*, 414 U.S. 338, 351-52 (1974))).

The current state of exclusionary-rule jurisprudence can be summarized as the very odd product of progressive doctrine applied by reactionary justices. The turn to regulatory Fourth Amendment theory was called for by institutional and technological changes quite aside from ideological changes on the Court. Professional police, organized crime, and electronic surveillance made the *ancien régime* untenable. The reworking of Fourth Amendment law away from the atomistic perspective was inevitable and no Justice, even one with strong originalist pretensions, seems inclined to re-think it.⁵²

B. The “New” Exclusionary Rule Debate: *Hudson* and *Herring*

I. Hudson

The issue in *Hudson v. Michigan* was whether the exclusionary rule applies to evidence obtained in the search of a residence authorized by a valid warrant, but executed inconsistently with the knock-and-announce requirement announced in *Wilson v. Arkansas*.⁵³ The Court divided five-to-four, holding that the rule does not apply. This result could have been reached on the ground of inevitable discovery.⁵⁴ The majority noted as much.⁵⁵

Part III.B of the opinion nonetheless deployed the now familiar cost-benefit balancing test.⁵⁶ The majority went so far as to say that the costs of exclusion outweighed the benefits even if the knock-and-announce rule would be nullified by withholding this remedy.⁵⁷ Justice Scalia’s discus-

52. For example, in *Kyllo v. United States*, 533 U.S. 27 (2001), Justice Scalia wrote the majority opinion characterizing thermal-imaging of a private residence as a search. The technique would not have been a trespass at common law, and although Justice Scalia noted criticisms of *Katz v. United States*, 389 U.S. 347 (1976), he did not propose returning to the trespass regime assumed by the founders.

53. 514 U.S. 927 (1995).

54. See *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring) (“In this case the relevant evidence was discovered not because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required.”).

55. See *Hudson*, 547 U.S. at 601 (“While acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock-and-announce.”).

56. *Id.* at 594-99.

57. See *id.* at 596 (“Of course even if this assertion [that without suppression there will be no deterrence of knock-and-announce violations at all] were accurate, it would not necessarily justify suppression.”).

sion repeats the pro-police mantra: exclusion is a “massive remedy”⁵⁸ that carries “substantial social costs.”⁵⁹

The opinion adds, however, another argument: Fourth Amendment remedies may have been inadequate when *Mapp* was decided in 1961, but those remedies are much stronger now.⁶⁰ Justice Scalia pointed to the recognition of entity liability in *Monell v. New York City Department of Social Services*,⁶¹ the provision authorizing payment of attorney’s fees to successful § 1983 plaintiffs,⁶² and the increasing professionalization of the police.⁶³

Like his predecessors on the Burger Court, Justice Scalia did not mention two cogent and long-standing arguments against the cost-benefit analysis. One is that the cost of lost convictions is attributable not to the exclusionary remedy, but to the underlying Fourth Amendment right.⁶⁴ If the police complied with constitutional standards, the evidence would never be discovered and the guilty would remain at large.

In unusual cases, like the knock-and-announce cases, compliance with constitutional standards does not prevent the discovery of the evidence. The inevitable discovery exception covers these cases. Whenever Fourth Amendment doctrine forbids evidence, there is a “cost” only if a current policy preference for unlimited law-enforcement is given priority over the constitutional preference for limiting law enforcement power.

58. *Id.* at 599 (“Resort to the massive remedy of suppressing evidence of guilt is unjustified.”).

59. *See id.* at 591.

60. *See id.* at 597 (“*Mapp* could not turn to Rev. Stat. § 1979, 42 U.S.C. § 1983, for meaningful relief . . .”). *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which determined that “[c]itizens whose Fourth Amendment rights were violated by federal officers” could bring suit, was decided ten years after *Mapp*.

61. *See Hudson*, 547 U.S. at 597 (*Monell*, 436 U.S. 658 (1978), was decided seventeen years after *Mapp*).

62. *See id.* (Congress authorized recovery of fees in successful § 1983 actions in 1976).

63. *Id.* at 599 (“There have been ‘wide-ranging reforms in the education, training, and supervision of police officers.’” (citing SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990*, at 51 (1993))). Dr. Walker, on whose work the court relied, subsequently protested that Justice Scalia had failed to appreciate the extent to which police professionalism is a product of the exclusionary rule. *See Samuel Walker, Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5:

Scalia’s opinion suggests that the results I highlighted have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police. I have never said or even suggested such a thing. To the contrary, I have argued that the results reinforce the Supreme Court’s continuing importance in defining constitutional protections for individual rights and requiring the appropriate remedies for violations, including the exclusion of evidence.

64. *See, e.g., People v. Cahan*, 282 P.2d 905, 914 (Cal. 1955) (“This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves.”).

In a minority of cases, exclusion costs the public a conviction the police might have achieved later without violating the Fourth Amendment. When police have probable cause but don't bother getting a warrant, or when they search an automobile with less than probable cause but later learn of information that would have gotten them over that hurdle, we can say that the exclusionary rule, rather than the Fourth Amendment, caused the loss of the evidence. Most of the time, however, the police never could have made a case without violating the Fourth Amendment; the inevitable discovery exception again covers many of the cases where they might have done so.⁶⁵

The second familiar argument Justice Scalia ignored is related to the first. *Any* effective remedy for Fourth Amendment violations will carry those same "substantial social costs."⁶⁶ Justice Scalia seems to be in a celebratory mood in writing about damage actions and police professionalism, as if searches that don't take place because of the threat of tort liability or departmental discipline are somehow different from searches that don't take place because of the threat of exclusion.

These points have been in the literature since the 1920s.⁶⁷ If they were bad arguments we would expect exclusionary rule critics to acknowledge them and reply. Anyone who was a fair-minded critic of the exclusionary rule who had such a rejoinder would surely have deployed it.

The claim that modern tort suits and modern police departments have made the exclusionary rule unnecessary reflects the same prejudice against the exclusionary rule. Legal recognition of municipal liability is both difficult to establish⁶⁸ and practically irrelevant. Cities and police departments typically pay for the defense of claims against individual officers and indemnify the officers after a settlement or a plaintiff's verdict.⁶⁹ In 1976,

65. See Dripps, *supra* note 17, at 12 ("[B]ecause the very great majority of crimes are not cleared by arrest there is good reason to doubt that perfect police work would have secured convictions in very many of those few cases lost to suppression motions." (footnote omitted)).

66. See, e.g., *id.* at 19 ("They would, however, carry the downside of effective deterrents: they would cause many crimes to go unexposed, foster police perjury to defeat liability, and might chill officers from conducting justified but borderline searches and seizures.").

67. See Connor Hall, *Letters of Interest to the Profession, Evidence and the Fourth Amendment*, 8 A.B.A. J. 646, 647 (1922) ("If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.").

68. See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 263 (2000) ("Occasionally, localities can be sued directly under § 1983 and held liable without proof of fault, but the circumstances are very limited." (footnote omitted)).

69. See *id.* at 267 ("[G]overnments routinely defend their officers against constitutional tort claims and indemnify them for adverse judgments.").

Congress passed 42 U.S.C. § 1988(b), authorizing attorney's fees for successful plaintiffs. There is no correlative provision for *Bivens* actions.⁷⁰

The practically relevant rules for damage actions against the police thus have not changed for more than thirty years. If there has been a change, it has been cultural rather than legal. Marc Miller and Ron Wright's survey of reported settlements of suits against police presents persuasive evidence that the police can be sued successfully.⁷¹ Previous empirical work, however, indicated that recoveries against the police would be substantial primarily when the police had inflicted physical injuries, especially when the police acted in bad faith.⁷² As Wright and Miller point out, the secrecy of settlements means that we can only speculate about the nature of the claims. My own suspicion is that most of the settlements reported by Wright and Miller involved claims based on *Tennessee v. Garner*⁷³ or *Graham v. Connor*,⁷⁴ not illegal stops, arrests, or auto searches.

The inability of the *Hudson* majority to find a single successful tort suit for violation of the knock-and-announce rule is illustrative.

2. Herring

The Court characterized the issue in *Herring v. United States* as whether evidence found in a search incident to an arrest, based on an erroneous police record of an outstanding arrest warrant, should be suppressed.⁷⁵ The same Justices that composed the *Hudson* majority held that the evidence

70. See Margot Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1631 n.253 (2003) (42 U.S.C. § 1988(b) applies only in § 1983 actions; Equal Access to Justice Act applies only to suits against the United States or officers in their official capacities, thus excluding *Bivens* actions).

71. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757 (2004).

72. See *id.* at 767 ("The largest cases tend to involve serious physical injuries or sexual misconduct by officers. The bigger payments also occur when officers act based on racial prejudice or some personal hostility to the plaintiff." (footnotes omitted)).

73. 471 U.S. 1 (1985) (holding the fatal shooting of a non-dangerous suspect to be unreasonable seizure).

74. 490 U.S. 386 (1989) (holding that excessive force by police can establish a Fourth Amendment violation supporting suit for damages).

75. The actual facts are less sanitary. See *Herring v. United States*, 129 S. Ct. 695, 698. Investigator Anderson was willing to phone around the state looking for a reason to give Herring a toss. By strange coincidence he received oral notification of an outstanding warrant, actually rescinded but that "for whatever reason" was not recorded as rescinded. Oddly enough, the timing simply forced the good officer to arrest Herring not on the sidewalk, but in his truck, which could be searched incident to arrest. If pretextual arrests were crimes, there would be reasonable suspicion, if not indeed probable cause, against Investigator Anderson. See *id.*

should be admitted. Speaking this time through the Chief Justice, the Court deployed the *Calandra* cost-benefit analysis, and concluded that:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.⁷⁶

In a footnote to this passage, the majority engaged the dissenters as follows:

We do not quarrel with Justice Ginsburg's claim that "liability for negligence . . . creates an incentive to act with greater care," and we do not suggest that the exclusion of this evidence could have *no* deterrent effect. But our cases require any deterrence to "be weighed against the 'substantial social costs exacted by the exclusionary rule,'" and here exclusion is not worth the cost.⁷⁷

In this revealing passage, the majority agrees that suppression would prevent future violations of the Constitution, but characterizes prevention of constitutional violations as not worth the loss of a single case against a hoodlum so dysfunctional that he cannot drive to the impound lot without his contraband.

Two dissenting opinions quite cogently challenged the majority's general deterrence analysis⁷⁸ and the extension of the *Leon-Evans* line of cases to records maintained by the police.⁷⁹ These points, however, accept the basic *Calandra* framework. All four of the dissenters, Justices Ginsburg, Stevens, Breyer, and Souter, also endorsed a direct attack on that approach.

Echoing earlier dissenting opinions by Justice Brennan and Justice Stevens, and the views of Professor Yale Kamisar, Justice Ginsburg argued that exclusion serves purposes other than deterrence and is an integral component of the substantive constitutional right.⁸⁰ That view is examined more closely (and critically) in Part III. For present purposes it suffices to

76. *Id.* at 702 (citation omitted).

77. *Id.* at 702 n.4 (citations omitted).

78. *Id.* at 708 (Ginsburg, J., dissenting) ("The [majority's] suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care.").

79. *See id.* at 711 (Breyer, J., dissenting) ("Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than" the majority's approach). Justice Breyer's reading of the case law is supported in Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

80. *See id.* at 70-08 (Ginsburg, J., dissenting).

say that the exclusionary rule is back, but unchanged since the 1980s. A bloc of five Justices regards compliance with the Fourth Amendment as a cost and exclusion as accordingly disfavored, while a bloc of four dissenters would sever the exclusionary remedy from deterrence calculations and tether it instead to the underlying substantive right.

In my view, both blocs are wrong. The next two parts of this Article explain why.⁸¹

II. NORMATIVE AND EMPIRICAL DIMENSIONS OF THE OVERDETERRENCE HYPOTHESIS

A. The Overdeterrence Concept

Remedies for the violation of legal rules optimally deter when potential violators rationally expect the violation to have a value of zero.⁸² If violations can be expected to return net gains, the rule will be violated even when compliance would be possible at lower net cost. If the regulated actors rationally anticipate the value of violations to be negative, they will refrain from borderline but legal conduct with positive benefits, or adopt precautions that cost more than the value of the violations they prevent.

The standard tort model has some plausibility as applied to suits against the police. Given the prevalence of defend-and-indemnify arrangements, cities or police departments are repeat players estimating the benefits and costs of their agents' behavior with respect to a large pool of cases. In many of the cases in the pool, the legality of police action will be uncertain *ex ante*. So overdeterrence and underdeterrence are both possible. The police could avoid all Fourth Amendment violations by playing pinochle in the station house, and they could uncover a lot of evidence by searching on mere suspicion or *en masse*. Society favors neither extreme, and this looks a lot like how we think about industries that cause some harm but confer great benefits, like mining, transportation, power generation, and so on.

The difficulty in applying the optimal-deterrence prescription to search-and-seizure is that there is no symmetry between the gains the regulated ac-

81. Part II of this article is a revised and expanded version of a paper originally presented at the Lexis-Nexis Criminal Procedure Forum held at Emory University School of Law in December 2008 (i.e., post-*Hudson*, but pre-*Herring*), and published with the other symposium papers as Donald A. Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209 (2010).

82. See, e.g., Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 554 (2005) ("The efficient level of care is the amount at which the marginal cost of care equals the expected marginal cost of an accident.").

tors secure from violations and the cost of those violations. Such symmetry is thought to exist in tort law, where damages are set so that the tortfeasor's damages equal the value of the plaintiff's loss, with punitive or pain-and-suffering damages thrown in to account, very roughly, for the reality that the probability of a successful suit, even in meritorious cases, is less than one.

When the police kill or injure the victim, tort damages can be estimated just as the tort system estimates damages for wrongful death or personal injury in other cases. Even here, however, there is good reason to doubt that damage actions achieve optimal deterrence of unlawful police violence. The qualified-immunity defense means that police violence incurs liability only when clearly excessive. The police employer therefore does not expect to internalize the costs of every illegal police shooting or beating, with corresponding incentives to train and discipline the force. There are political incentives at work as well, but those may work in favor of aggressive policing as well as against it. Police immunity gives reason to doubt whether we are optimally deterring even police violence.

Damage actions, however, offer the only practical remedy for police misconduct not motivated by the desire to initiate a formal prosecution. The exclusionary rule does not deter police who beat up citizens for sport. If we abolish qualified immunity (which was as unknown to the founders as the exclusionary rule⁸³), we might come closer to optimal deterrence. The risk, however, is that the prospect of liability might induce the police to refrain from violence even when justified, leading to the escape of dangerous felons. The immunity defense was created to prevent this very contingency.⁸⁴

83. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 208-15 ("If [the defendant] admits the fact [of a trespass], he is bound to shew by way of justification, that some positive law has empowered or excused him." (citing *Entick v. Carrington*, 19 Howell's St. Trials 1029, 1066 (C.P. 1765))). Reasonableness might mitigate damages, but it would not negate liability. Blackstone says: "the law . . . determines the quantum of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained." *Id.* at 209. Thus in *Wilkes v. Wood*, Wood had relied on the warrant issued by the Secretary of State, but was nonetheless found liable in trespass for damages of £1000, a huge sum for the time. See 19 Howell's St. Trials 1154 (C.P. 1763).

84. See John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1408 (2007) ("[A]ny attempt to extend damages liability to the case of borderline error runs headlong into the judicial rationale for qualified immunity. In no other context is the problem of overdeterrence—more precisely, the problem of unintended deterrence of legitimate acts—more keenly felt."). Contrary to Professor Slobogin's suggestion, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999), good-faith immunity does not eliminate the possibility of overdeterrence. If the expected sanction is severe enough, the risk that the agency or court might er-

The exclusionary rule influences police behavior in the pool of cases in which the objective of the search or seizure includes enabling a formal prosecution. Strictly speaking, the victim of an unlawful search who is prosecuted may both suppress the evidence on the criminal side and sue the officers on the civil side. Indeed, the Supreme Court has upheld so called plea-bargain/release agreements, in which the search victim waives civil remedies as part of a plea deal.⁸⁵

Typically, however, exclusion operates in cases where damage actions face formidable valuation problems. We can perhaps estimate the employer's benefit from the government's willingness to pay tens of thousands per year to incarcerate the guilty and the added expense of the police force itself. Any such calculation will typically dwarf the economic damage from unlawful stops, searches, and even arrests. Guessing about liquidated damages runs the risk of overdeterrence.

The *Hudson* majority supposes that this remedial mix of damage actions, limited by qualified immunity, and the exclusionary rule, is overdetering Fourth Amendment violations. To unpack the overdeterrence hypothesis, we should begin with a normative point. Knowing violations of the Constitution cannot be justified by police calculations of costs and benefits. Suppose police have probable cause to believe that a murder weapon can be found in a particular house, but they have no warrant to search. Suppose, further, that they know the house to be temporarily unoccupied. Entry, therefore, would disturb no one. Now suppose that the residents have left a window open, so that the police could enter without doing any damage to property. The police have no warrant, but they are confident one would be issued if they applied for one. They are also confident that their department would cheerfully pay whatever a tort suit might cost to make a major case. Exclusion gives them an incentive not to enter and search the house; is this overdeterrence?

The Supremacy Clause says no. Presumably the compelling-state-interest safety valve applies in Fourth Amendment cases, so that if catastrophic consequences would follow from compliance with the usual constitutional rules, the police might disregard those rules *without* violating the Constitution. This is analogous to Congress enacting a law authorizing censorship of the news in wartime, the text of the First Amendment notwithstanding. If, however, we leave the compelling-interest scenario aside,

roneously find the violation to be knowing, rather than in good faith, might deter many justified police interventions. A damage remedy limited to compensation, coupled with good faith immunity (basically the current § 1983 system, even if applied by an agency), avoids overdeterrence only by tolerating substantial underdeterrence.

85. See *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

the police should do exactly what the exclusionary rule encourages them to do—get a warrant, even if this means that the evidence may disappear before it can be seized.

The same normative analysis applies to searches permitted by the Constitution without warrants, but only on condition of probable cause or reasonable suspicion. Suppose a thousand cars are parked by a valet service for a Rolling Stones concert. The police could, at negligible cost, seize the keys from the service and search every vehicle. Does the Fourth Amendment permit them to balance the costs of search against the value of evidence, or does it rather balance those values independently of current policy preferences by requiring probable cause?

The position I am defending is different from the claim that the Fourth Amendment establishes a property rule rather than a liability rule.⁸⁶ I have tried over the years to conceptualize the Fourth Amendment as a liability rule or a property rule, but the private-law dichotomy does not easily transpose to a constitutional limit on the public force. Indeed, because the property/liability distinction turns on remedies rather than rights, the variety and controversy over Fourth-Amendment remedies renders the private-law distinction problematic in this context. Rather, the Fourth Amendment protects particular individual interests against government encroachment absent specified prerequisites. This substantive rule is protected by a mix of remedies. Egregious violations are punishable both criminally⁸⁷ and by punitive damages.⁸⁸ Ongoing violations can be enjoined,⁸⁹ even when undertaken in good faith based on legal advice.⁹⁰

Professor Kontorovich makes a useful point by distinguishing slow-moving from fast-moving Fourth Amendment events.⁹¹ Obviously enough,

86. The seminal authority for this proposition is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). In his debate with Professor Kamisar about the exclusionary rule, *infra* note 180, Judge Calabresi made no use of the property/liability construct, which tends to support the point in text.

87. *See, e.g.*, *Koon v. United States*, 518 U.S. 81 (1996) (reviewing the sentence imposed following the conviction of the police officers accused of the Rodney King beating, which was recorded on videotape).

88. *See, e.g.*, *Wilson v. Aquino*, 233 F. App'x 73 (2d Cir. 2007) (upholding a punitive damage judgment for an illegal body-cavity search).

89. *See, e.g.*, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (enjoining the search of hundreds of homes based on arrest warrants for two individuals).

90. For example, suits challenging road block policies and drug testing programs are typically framed as pleas for injunctive relief. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

91. *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis to Constitutional Remedies*, 91 VA. L. REV. 1135, 1178-79 (2005) (distinguishing warrant-clause cases from reasonableness-clause cases, and arguing that latter cannot be liti-

in most cases, Fourth Amendment violations can be remedied only ex post, typically by exclusion, damage actions, or both. To say that ex post remedies are the only ones we have is not to say that the sanction for violations should equal either the victim's loss or the violator's gain, because in the Fourth Amendment context these are different.

There may be violations for which damages provide the best practical remedy, but those damages are not, and should not, be limited by compensation; rather, they should be set high enough to eliminate all but irrational incentives for violation. Private law abhors holdouts and eccentrics. The Fourth Amendment protects them. The government has no more right than, say, Bill Gates to break into houses or lock people up with a cheerful willingness to pay damages ex post.

What makes some knowing violations of the Fourth Amendment look attractive is the failure of substantive doctrine to factor the seriousness of the suspected offense into the determination of reasonableness. Professor Stuntz has criticized the transsubstantive character of Fourth Amendment jurisprudence.⁹² Prevailing doctrine might be justified by the tendency of judges to consider offense severity in practice. However one resolves the transsubstantive issue, the issue is one of substantive, rather than remedial, law.

In the Fourth Amendment context, then, overdeterrence does not mean that the monetized expected value of evidence that might be found from illegal searches exceeds the expected damages to be paid for those searches.⁹³ The substantive constitutional provision has balanced the costs

gated ex ante so that the Fourth Amendment should be understood as a liability rule). I find this analysis unsatisfying. For one thing, administrative searches are analyzed under the reasonableness clause, not the warrant clause, but are typically tested by suits for injunctive relief, as in the drug testing and roadblock cases. More fundamentally, the property/liability dichotomy does not tell us whether to choose compensatory or deterrent measures for sanctions ex post. In, for example, a police homicide case like *Tennessee v. Garner*, 471 U.S. 1 (1985), the only feasible remedy is ex post. It does not follow that the amount of damages should be compensatory rather than punitive.

92. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

93. Writing in 1982, Judge Posner took the view criticized in the text. Assuming that a search would enable a conviction society values at \$10,000, and that \$100 would be adequate compensation for lost privacy and the costs or repair,

[t]he much larger "fine" that is actually imposed will overdeter, causing the government to steer too far clear of the amorphous boundaries of the fourth amendment compared to what it would do at the optimal fine level. The lawful searches that are forgone and the convictions of the guilty which those searches would have produced are social opportunity costs that the lower fine would have avoided.

Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982) [hereinafter Posner, *Excessive Sanctions*]. This seems wrong because the substantive constitutional provision excludes utility from prohibited

and benefits of those searches quite differently. Overdeterrence of constitutional violations, therefore, means discouraging *lawful* police actions in a pool of cases where the legality of prospective actions is uncertain.

The *Hudson* majority is therefore wrong to characterize the loss of reliable evidence as the "substantial social costs" of the exclusionary rule. Justice Roberts's smug reference to the prominence of prior dissents in Justice Ginsburg's *Herring* opinion⁹⁴ would make a better point if prior majority opinions spoke to the argument that they were treating violations of the Constitution as desirable and compliance with the Constitution as a cost. As those opinions stand, the Chief Justice appears to take comfort in the frequency with which this error has been repeated.

However we enforce them, limits on police power facilitate crime. There should be no blinking of the fact that freedom and safety do conflict. A free society will have more crime than a police state, and crime is undoubtedly a "substantial social cost." That cost, however, is properly charged to freedom itself.⁹⁵ Were it not for the Fourth Amendment, ple-

practices, just as the criminal law excludes utility from contraband. Writing in 1999, Judge Posner took a different and, to my mind, more persuasive approach:

Yet most [exclusionary rule critics] do not argue that the misconduct should be condoned or redefined as proper conduct; they merely advocate the substitution of other sanctions that would not involve excluding the fruits of the illegal search. If the substitute sanctions were effective in deterring the misconduct, there would not be any fruits, and so there would be no net gain from the standpoint of accuracy in adjudication. Instead, the critics should be advocating either that the standard for determining whether a search is illegal should be redefined, and specifically that searches should be deemed illegal only if the evidentiary benefits do not equal or exceed the costs of the search to the victim; or that the only sanction for an illegal search should be a suit for compensatory damages. The latter approach would require the police, in effect, to "buy" the fruits of their "illegal" searches from the victims, which they presumably would do when the evidentiary benefits exceeded the costs to the victim of the search.

Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533 (1999). "The latter approach" is an option only if the first approach is also taken, or if it is understood as the same approach, once again masking substance as remedial. If the tort damages reflected a constitutional component in excess (traditionally very greatly in excess) of the cost of a cleaning crew and new hinges, tort suits that promised recovery of constitutionally adequate damages would cause the loss of the very evidence now excluded.

94. *Herring v. United States*, 129 S. Ct. 695, 700 n.2 (2009) ("Justice Ginsburg's dissent champions what she describes as a more majestic conception of . . . the exclusionary rule, which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis." (alteration in original) (internal quotation marks and citations omitted)).

95. Ironically, the *Hudson* majority is very much on board with *Crawford v. Washington*, 541 U.S. 36 (2004), a decision with more blood on it in five years than *Mapp* has on it in nearly fifty. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L.

nary search powers might very well prevent some of the very worst crimes—terrorist attacks like those of 9/11 or the repeated incidents of rape, torture, and murder perpetrated behind closed doors by the likes of John Wayne Gacy or Leonard T. Lake. Were it not for the Fourth Amendment, plenary search powers certainly would make the production and distribution of cocaine, heroin, and child pornography on an industrial scale much more difficult. We retain, indeed revere, the Fourth Amendment in spite of these horrific consequences.

The Fourth Amendment is one of those civil liberties the United States has fought its wars to establish and preserve. General warrants and the writs of assistance were among the grievances inspiring revolution.⁹⁶ Sweeping search and arrest powers were a necessary component of the odious southern slave apparatus.⁹⁷ The Second World War and the Cold War (including the shooting wars in Korea and Vietnam) were waged with the object of preventing the global hegemony of aggressive police states.⁹⁸ In the latter struggle, the United States stood ready to use nuclear weapons against cities.⁹⁹ In the former struggle, it actually did so.¹⁰⁰

If the Fourth Amendment is worth waging war, it is worth tolerating crime. We can be grateful that sophisticated policing and pragmatic doctrine keep that cost as low as it is.¹⁰¹ We should not, however, sugarcoat

REV. 747, 772-73 (2005) (“In Dallas County, Texas, judges are dismissing up to a dozen domestic violence cases per day because of evidentiary problems related to *Crawford*.”).

96. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (resentment against writs of assistance and general warrants was “so deeply felt by the Colonies as to be one of the potent causes of the Revolution”).

97. See, e.g., ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE 1789-1868*, at 106-225 (2006).

98. See, e.g., Franklin D. Roosevelt, President, United States of America, Address to Congress (Four Freedoms Speech) (Jan. 6, 1941), available at <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> (decrying the “new order of tyranny” and stating that “[t]he American people have unalterably set their faces against that tyranny”).

99. See, e.g., NORMAN POLMAR & JOHN D. GRESHAM, *DEFCON-2: STANDING ON THE BRINK OF NUCLEAR WAR DURING THE CUBAN MISSILE CRISIS* (2006).

100. See, e.g., RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 734 (1986) (“More recent estimates place the number of deaths [from the atomic bomb dropped on Hiroshima] up to the end of 1945 at 140,000. The dying continued; five-year deaths related to the bombing reached 200,000.”); *id.* at 740-42 (“70,000 died in Nagasaki by the end of 1945 and 140,000 altogether across the next five years, a death rate like Hiroshima’s of 54 percent.”).

101. Cf. Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 174 (2003) (finding through an empirical study based on FBI Uniform Crime Reports data in pre-*Mapp*-no-exclusion and pre-*Mapp*-exclusion states that “*Mapp* increased crimes of larceny by 3.9%, auto theft by 4.4%, burglary by 6.3%, robbery by 7.7%, and assault by 18%”). When confronted by the finding that states that adopted the exclusionary rule on their own *decreased* the crime rate, the authors freely speculate about self-selection. See *id.*

the facts. The choice between freedom and security is tragic, in the sense that however a political community makes that choice, some innocent people will suffer terribly as a result. In our political community we have made that choice, as irrevocably as we can, against an unlimited commitment to security. Loose references to lost evidence as a "cost," made without reference to the constitutional judgment that the better course is *not* to gather all possible evidence of crime, should be banished from the law and from the literature as the veiled attacks on the Constitution that they are.

If we take the substantive Fourth Amendment law as given and worthy of content-independent respect, it follows that the police should be trained to refrain from searches and seizures whenever the proposed action is more likely than not illegal. The reverse is not true; the police may often gain an advantage by delaying a stop, search, or arrest for some time after they have established legal grounds. The current remedial mix would overdeter if, and only if, the police have a net incentive to refrain from searches and seizures for other than tactical reasons, even when the potential action is probably legal.

B. Police Incentives

Police behavior on the street is the product of a long sequence of agency relationships. Voters elect a municipal government, the government establishes a police force, and the administrators in charge of the force train its officers and reinforce this training by rewarding compliance and punishing noncompliance. A brief look at the relationship between officers on the street, whose conduct is the *actus reus* of any Fourth Amendment violation, suggests that the focus of policy analysis should be on police administrators.

Individual officers do not internalize either the benefits or the costs of Fourth Amendment activity. When the police apprehend an offender, they may improve their performance evaluations and gain prestige within the

at 171. It is no more of a reach to speculate about self-selection in other ways. For example, law-and-order states that did not exclude before *Mapp* might have been the first to make narcotics an urgent priority shortly thereafter. Prioritizing drug offenses draws police resources away from reported crimes to unreported ones. If this switch took place faster after *Mapp* in states that had not had the exclusionary rule hitherto, all the data would show is the effect of an exogenous change in law-enforcement taste.

The basic point, however, should not be lost. Any method of enforcing legal limits on the police will cause some victimization of innocent people—including some murders. Put another way, how should we characterize the Atkins and Rubin numbers? Do they reflect the high price of Warren Court activism? Or do they reflect the marginal benefits of lawless policing, including midnight entries, pumping stomachs, planting microphone in private bedrooms, and indefinite detention *incommunicado* on suspicion—all, of course, without warrants?

force. They do not, however, pocket what the community is willing to pay to prosecute and punish the offender.

Nor do individual officers internalize the costs of Fourth Amendment activity. The police get paid whether or not they are deployed to their highest use. If police seize evidence in violation of the Fourth Amendment, the evidence may be suppressed, but the police are not automatically fined or jailed. Although the practice is somewhat subterranean, cities and departments apparently pay for the defense of lawsuits against individual officers, and, when the individuals are liable, indemnify the individual officers for the cost of damages or settlements.¹⁰² Individuals, therefore, do not internalize (nor do they expect to internalize) these costs.¹⁰³

So the law influences street-level behavior primarily by giving police administrators incentives to train and discipline the force to comply with constitutional requirements. Call whomever is in charge of the police, the employer, R. Let us assume that R is a rational actor with an incentive to maximize measurable indicia of crime control (arrests, clearance rates, convictions, reductions in reported crimes, maybe even victimization survey numbers). Let us further assume that R is obligated, by contract or custom, to defend and indemnify employees against civil rights actions.

Built into this model is an important and nonobvious assumption. The model assumes that R has no content-independent respect for law. If R has a taste for complying with formal legal prescriptions, R will train and discipline the force to be more compliant than the model predicts. The assumption is debatable but in my view justified by the available information.¹⁰⁴

102. See Jeffries, *supra* note 68, at 267.

103. See *id.* (“[I]n cases of flagrant misconduct (of the sort that might trigger criminal prosecution), a government might cut its employee loose, but it is hard to imagine a case of simple search and seizure (unaccompanied by assault or other grievous harm) provoking that reaction. Thus, although government officers cannot capture the social benefits of their actions, neither do they pay the full costs.”).

104. The political incentives facing public officials responsible for the police are distinctly tilted in favor of security over liberty. I remain convinced of the basic soundness of the position I advanced in Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice, OR: Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). For a more recent resume of the supporting arguments, see Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 145-50 (2005). Professor Rosenthal, in distinguishing public from private liability-based incentives, seems to agree that sanctions that might be optimal from the perspective of a private firm may be inadequate to ensure constitutional compliance by public entities. See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Tort, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 842-43 (2007) (“Even aside from political opportunity costs, liability-producing conduct may have political benefits that offset the deterrent effect of liability. To use Professor

R will train and discipline the force NOT to act unless:

$$EB \geq EC$$

where EB is R's expected benefit from action and EC is R's expected cost. EB, the expected benefit, can be broken down into nonevidentiary benefits ("NEB") and evidentiary benefits ("EVB"). NEB includes such gains as discouraging crime by visible patrol presence or preventing domestic violence by arresting the abusive boyfriend. EVB includes the gain from enabling prosecutions based on evidence expected from a prospective action.

EC can be broken down into opportunity cost ("OC") and liability cost ("LC"). Once the funds are appropriated to pay for the force, the cost of those funds is fixed. The force itself, however, can be deployed in different ways. Police engaged in routine patrol could be working undercover drug operations or gang investigations. The size of OC depends on the expected benefits from the next-best-use ("NBU") that might be made with the quantity of resources ("QR") devoted to any given operation.

R has an incentive to deploy the force to its highest uses measured by whatever crime-control measures R adopts. The next-best use for marginal police resources is the value of R's highest unmet priority—which is small enough that given R's budget constraint, that priority is not addressed at all. The size of OC therefore depends to some extent on whether the police face a target-rich or target-poor environment. OC will be greatest when a police operation consumes large resources in a target-rich environment, and smallest when the operation consumes modest resources in a target-poor environment.

The primary effect of the exclusionary rule is to reduce EVB. If the police are certain that a proposed search will be held legal, EVB is unchanged. If the police are certain that it will be held illegal, EVB is reduced to zero. In uncertain cases, if evidence is found, there will be a probability of exclusion; call it PX. The effect of the exclusionary rule is to multiply EVB by (1-PX).

The risk of exclusion also changes the opportunity cost term, because one cost of a search is the risk that the evidence will be discovered at a time when the police lack probable cause or reasonable suspicion but could have established it later had they delayed and sought additional supporting information. This cost—the normatively relevant cost of exclusion—is reduced, but not eliminated, by the inevitable discovery exception. The in-

Levinson's example, a program of aggressive stop-and-frisk of young males in high-crime areas may increase liability, but it also may pay such handsome political benefits that liability will have no deterrent effect." (citation omitted)).

evitable discovery exception requires proof by a preponderance that the tainted evidence would have been found later and lawfully but for the premature police intervention.¹⁰⁵ In some cases the evidence would have been found later and lawfully but the prosecution will not be able to prove this. This cost is genuine, but given the inevitable discovery exception, and the readiness of judges to make the required finding, I will treat it as negligible.¹⁰⁶

So viewed, the exclusionary rule is less a penalty for police illegality than a bounty for legality. This bounty can influence police behavior because the opportunity costs and liability risks of action may outweigh the nonevidentiary benefits but not the total benefits of action. The exclusionary rule reduces the expected evidentiary benefit, in direct proportion to the probable unlawfulness of the prospective search or seizure.

LC has two components, the probability of damages (“PD”) and the quantity of damages expected (“QD”). We can now describe the incentives facing R by the equation:

$$NEB + (EVB * (1 - PX)) \geq (QR * NBU) + (PD * QD)$$

The police should act only when they expect the gains, discounted by the risk of exclusion, to outweigh the opportunity cost plus the risk of damages.

The present remedial mix would be overdetering if PX, PD, and QD are high enough to eliminate the expected net benefit from searches that are probably legal and otherwise cost-beneficial according to R’s utility function. If this were true, we would expect the police to refrain from justifiable but borderline searches, by choosing to intervene only when the legality of their actions is highly probable. I think this hypothesis can be tested against empirical evidence on the success rates of different types of searches.

Fourth Amendment law’s primary requirement is of some level of antecedent suspicion. Searches for evidence can only be justified by probable cause. Investigative stops can only be justified by reasonable suspicion. If we could agree on numbers for probable cause and reasonable suspicion, and knew the success rates the police were encountering in a large sample of cases, we would have some evidence bearing on the overdeterrence hypothesis. If hit rates were substantially higher than the prescribed level of antecedent probability, police would be refraining from high-probability searches.

105. See *Nix v. Williams*, 467 U.S. 431 (1984).

106. See *Dripps*, *supra* note 17.

It might be the case that hit rates are so high that the likely explanation would be that police action was limited not by the legal rules but by resource constraints. That seems implausible. Clearance rates for the index crimes are in the vicinity of 20%.¹⁰⁷ That suggests a target-rich environment (a high rate of offenses relative to police resources), but also that the targets are not easy to hit. Police searching at random would not discover a great deal of evidence. If hit rates are high, it is because OC and LC are high relative to NEB and (EVB * 1 - PX).

C. Testing the Overdeterrence Hypothesis

Has the current remedial mix had a chilling effect on police actions that are probably legal? This seems improbable, both from the incentives created by the current mix and from what direct evidence we have of police behavior. When police action is of debatable legality, the immunity defense insulates the officer from liability, and thereby the employer from indemnification. Exclusion reduces but does not eliminate the value of borderline actions, as police administrators probably derive considerable utility from seizing drugs and weapons even if these may not be used in court.

The exceptions to exclusion of tainted evidence are one reason.¹⁰⁸ The standing rule in particular means that the police can rationally anticipate some legal benefit from illegal searches when group criminality is suspected. When the police illegally seize contraband, the drugs or guns are off the streets even if they cannot be used as evidence. Many, probably most, arrests are made with no expectation of discovering evidence in the incidental search.

If the adjudication of suppression motions frequently resulted in false positives—erroneous findings that the police had acted illegally—exclusion might discourage borderline but lawful actions. If errors are distributed randomly, however, police administrators would expect false positives to be balanced by false negatives. In all probability, false negatives are more likely than false positives. Sympathetic judges and police perjury reduce the probability that evidence illegally seized in fact will be so ruled in court.

107. See, e.g., Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 146 (2005); see also U.S. Dep't of Justice, Fed. Bureau of Investigation, 2008 Crime in the United States, available at <http://www.fbi.gov/ucr/cius2008/offenses/clearances/index.html>.

108. See Jeffries & Rutherglen, *supra* note 84, at 1407 ("One suspects that many courts in many places strain to avoid [exclusion in border-line rather than flagrant cases]. Yet it is precisely in the context of the borderline mistake, the everyday close call that should have been made differently, that alternative remedies are hardest to find." (citations omitted)).

This assessment of the legal incentives facing police decision-makers is consistent with the most plausible empirical test of over or underdeterrence. The literature contains a considerable number of studies measuring the success rates of different types of searches and seizures. We can compare the “hit rate” with the level of antecedent suspicion the law requires for each species of search and seizure.

If the hit rate is clearly above the legally-required zone of ex ante probability, in a large sample we could infer either very high opportunity costs (a police force so small relative to offenses that it can process only high-probability cases, quite aside from remedies for legal violations), or over-deterrence (the police have the capability to engage in high-probability searches but refrain because of the fear of exclusion and damages). If, by contrast, the hit rate is clearly below the legally-required zone of ex ante probability, we could infer either very low opportunity costs (the police have so many resources relative to offenses that only low-probability cases are left to pursue), or underdeterrence (the police engage in lots of low-probability, and thus unlawful, searches, because the benefits of even low-probability cases exceed the costs).

Prior exclusionary rule research, and more recent research on racial profiling, has given us some evidence of the hit rates for search warrants for private premises, warrantless vehicle searches during traffic stops based on probable cause under *United States v. Ross*¹⁰⁹ and *California v. Acevedo*,¹¹⁰ and *Terry* stops¹¹¹ of citizens on the streets. The evidence is not as extensive as one might wish, but it *is* evidence, as distinct from mere conjecture of the sort set forth by the *Hudson* majority. Let us look at what we know about warrant searches, warrantless automobile searches, and *Terry* stops.

I. Warrant Searches

The Fourth Amendment requires probable cause to issue search warrants. The Supreme Court has resisted quantifying probable cause,¹¹² but

109. 456 U.S. 798, 804-25 (1982) (holding that where a police officer had probable cause to believe that an automobile contained narcotics, the officer could open a paper bag in the trunk of the car without first obtaining a warrant).

110. 500 U.S. 565, 575-76 (1991) (holding that where a police officer had probable cause to believe that a paper bag in the trunk of a suspect's auto contained marijuana, the police officer could open the paper bag without first obtaining a warrant).

111. This term comes from the case *Terry v. Ohio*, 392 U.S. 1 (1968), which held permissible a reasonable search for weapons for the protection of the police officer where he has reason to believe that the individual is armed and dangerous, regardless of whether he has probable cause to arrest the individual for a crime. *Id.* at 27.

112. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise . . . quantification into percentages because it deals with probabilities

the governing idea in the cases is that probable cause is present when the expected probability of success exceeds 50%, while a lower probability may sometimes suffice. The Supreme Court has read the Amendment to *require* warrants for some searches, primarily entry of homes without consent.

The warrant requirement increases OC because, aside from the collection of the information showing probable cause, the preparation of the application and the process of presenting the application to a judge consume significant amounts of police time.¹¹³ Search warrants have little NEB; police applying for a warrant are motivated by the desire to obtain admissible evidence. We should therefore expect that the police will seek warrants only when EVB is high—above the rough-and-ready 50% hit rate that would satisfy the probable cause standard.

In 1972, Michael Rebell studied search warrants executed in a Connecticut jurisdiction in two different years and found that 64% and 70% of the warrants resulted in the seizure of some of the target evidence.¹¹⁴ A study for the National Center for State Courts examined warrant practice in seven cities and found that the success rate for warrant searches, based on returns filed listing some of the target evidence seized, in six of the seven cities studied, ranged from 74 to 89%.¹¹⁵ More recently, Laurence Benner and Charles Samarkos’s study of search warrants issued by state courts in San Diego found that 65% of the executed warrants authorizing searches for illegal drugs resulted in the seizures of the target evidence.¹¹⁶

and depends on the totality of the circumstances. . . . [T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” (citations omitted)). In the leading case, *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Court equated probable cause with a “fair probability.” One might argue the reverse—that “less likely than not” can be equated with “improbable,” and therefore no probability at all. On the other hand, in *Pringle* the majority shied away from any numerical expression of required probability. Probably the best that can be said is that the probable cause standard is “a relatively high level of certainty akin to a more-likely-than-not standard” Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139, 150 (2005).

113. See Donald A. Dripps, *Living with Leon*, 95 YALE L.J. 906, 926-27 (1986).

114. Michael A. Rebell, *The Undisclosed Informant and the Fourth Amendment: The Search for Meaningful Standards*, 81 YALE L.J. 703, 723 (1972).

115. RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 46-50 (1983). These percentages were obtained by taking the percentage of searches in cases in which returns were filed that led to seizure of some item named in the warrant, and multiplying that percentage by the percentage of warrants for which returns were in fact filed.

116. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 249 (2000).

Warrant searches succeed at a rate that matches or exceeds the hit rate prescribed by the applicable legal standard. Does this suggest overdeterrence? Probably not. The numbers for success have not changed dramatically since *Leon*, even if the quality of the applications may have suffered. Since *Leon* and *Malley v. Briggs*,¹¹⁷ a defective warrant, absent gross ignorance or deliberate perjury on the part of the police, will trigger *neither* exclusion *nor* damages. The likely explanation for the high rate of success for searches pursuant to warrants is opportunity cost. Quite aside from the remedial mix of damages and exclusion, which have been withdrawn from warrant searches absent the most egregious facts, police who seek and execute warrants are interested in evidence and generally have probable cause.

If we view the warrant requirement solely as a means to the end of ascertaining probable cause in the most rational way, hit rates over 50% would indeed suggest overdeterrence. There is, however, no exception to either the substantive right, or the exclusionary remedy, when police act without a warrant even though probable cause is clearly present. It would seem to follow that the warrant process has additional purposes, including that of putting a costly hurdle between the police and the most sensitive Fourth Amendment interests—the privacy of the home and of confidential communications.¹¹⁸

The remedial mix enters the warrant context by framing the opportunity cost issue. Why would the police bother with the costly warrant process? Because the remedial mix makes bypassing warrants too costly. Search warrants are usually sought for home invasions (electronic surveillance is another common object). Absent consent or exigency, which the courts have been pretty scrupulous about with respect to home searches, the police know that home invasion requires a warrant. Judges facing a motion to suppress for a warrantless *home* search are willing to suppress and may feel no real choice about the matter. Citizens whose homes have been invaded may well bring suit, and police who enter homes without warrants are not likely to win on the immunity defense.

So it is not implausible, but all things considered probably incorrect, to say that the success rate for warrant searches should be near the 50% number the probable cause standard might suggest. To the extent that the Fourth Amendment requires the police to get warrants based on probable cause, the constitutionally-prescribed hit rate is higher than what we would

117. 475 U.S. 335 (1986).

118. See Stuntz, *supra* note 92, at 848 (“[R]equiring a warrant is a good thing if, but only if, the substantive standard applied to the search would otherwise be too low—if, that is, police will be too quick to search unless they are forced to get a warrant.”).

expect if the Fourth Amendment required only probable cause. The warrant requirement adds the cost of the warrant process to the requirement for home invasions, not just as a matter of police tactics but as a matter of the Fourth Amendment's constitutional trump over ordinary policy considerations. Given the legal requirement of both probable cause and a (costly) warrant, we should expect the hit rates from warrant searches to be somewhat above the 50% threshold—which is where it turns out that they are. Only if the costs to police of obtaining warrants were reduced to zero would we expect the hit rate to be 50%.

If hit rates for warrant searches are thought too high, the curtailment of both exclusionary and damage remedies for searches authorized by warrants suggests that the "culprit" is the cost of the warrant process. Action to reduce that cost to the police might move the hit rate closer to the 50% rate we might expect from a perfect assessment of probable cause *ex ante*.

Abolition of the exclusionary rule means that the police would enjoy the full evidentiary benefit of illegal warrantless home invasions. There are two possible scenarios. If the specter of tort liability is strong enough, nothing would change. No extra evidence will be discovered (and so much for the exclusionary rule's social costs!). If, however, admissibility of the evidence changes the balance of incentives so that the risk of tort liability is deemed worth the cost of a search that both the training department and the executing officers know is illegal, evidence will be obtained but only by treating the Constitution as unworthy of content-independent respect.

Both scenarios would play out. When the police expect the search victim to lack the means, the pluck, or the equities predictive of success in tort to actually sue, warrantless home invasions, à la *Mapp*, would flourish. Evidence of crimes by the wealthy, well-educated, and politically-connected would be just as inaccessible to justice as with the exclusionary rule.

2. Warrantless Searches

Under *Ross* and *Acevedo*, police need probable cause, but no warrant, to search vehicles for evidence or contraband. Prior to the racial profiling controversy, warrantless searches were hard to study. Police executing a warrant are obligated to make a return to the court, creating a documentary record.¹¹⁹ No such record typically accompanies a warrantless search.

Now, however, we have some data on auto searches, developed to address the controversy over racial profiling. Much of this data concerns the initial decision to stop, rather than the later decision to search. When hit

119. See, e.g., FED. R. CRIM. P. 41(f)(1)(D).

rates for stops are reported, the search might be based on consent, or as incident to arrest, rather than as a free-standing search for evidence based on probable cause. It is difficult to parse the data to find hit rates for this particular species of police behavior.

Sam Gross carefully analyzed data collected by the Maryland State Police.¹²⁰ The officers were required to report traffic stops and subsequent searches, and to identify when the search was based on consent. Treating all nonconsent searches as based on a claim of probable cause, Gross found the hit rate for these latter searches to be just under 48.4%.¹²¹ Again, at least superficially, that is about where the law says it ought to be.

Gross points out that there are two reasons to think that the Maryland data overstate the hit rate, perhaps dramatically. First, the police disliked the reporting requirement, and were, one supposes, far more likely to report hits than misses.¹²² Second, when the data are parsed for the importance of the evidence seized, the overall hit rate is far less impressive. If we factor out trace and personal quantities of marijuana, the hit rate for Maryland probable-cause searches drops to 9.8%.¹²³

Of course possessing marijuana for personal use is a crime. It is not, one supposes, what the police were looking for. A bigger reason to discount the hit rate, however, follows from the fact that in many cases probable cause for the vehicle search is derived from discovery in plain view (or plain smell) of a personal supply of marijuana. In these cases the search shows up in the overall statistics as a hit, even though the probable-cause-based search discovered nothing at all.

If the primary mission of the police who make traffic stops is traffic enforcement, the opportunity cost of the time added to each stop by a thorough search of the vehicle is high. Traffic violations are ubiquitous; the state gains revenue from citations and the police have incentives to issue those citations. In a study of the North Carolina State Police, William Smith and his colleagues found that troopers on patrol for speeding or other traffic infractions almost never searched and, moreover, were loath to do so.¹²⁴

120. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

121. *Id.* at 674 tbl.9.

122. *Id.* at 679 (“[Troopers] very likely did distort the records in these data by simply failing to report unsuccessful searches, a type of conduct that is also familiar from reports in New Jersey and New York.” (citations omitted)).

123. *Id.* at 700 tbl.14. The 9.8% figure is obtained by adding the 3.7% hit rate for small dealers to the 6.1% hit rate for medium/large dealers.

124. WILLIAM R. SMITH ET AL., *THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE* 157 (2003)

If, however, the primary police mission is drug interdiction, OC is lower. Undercover investigations to build a record for warrant searches are time-consuming and dangerous. Sell-and-bust operations are easier but net only ordinary users. LC for the search, independent of the stop, is low. Qualified immunity means that liability attaches only to police who are clearly mistaken about the probable cause issue, and reasonable people can often disagree about whether probable cause is present or not. Damages for an illegal roadside search are not likely to be high.

Accordingly, for warrantless searches, the remedy with the most influence on police behavior is the exclusionary rule. Gross’s numbers on their face suggest no overdeterrence. Regarded realistically, however, they suggest some degree of underdeterrence.

3. Terry Stops

Under *Terry v. Ohio*¹²⁵ and its progeny, the police may detain a suspicious person for investigation if they have what the cases call “reasonable suspicion” to believe he is engaged in criminal activity. If the courts have been reluctant to quantify probable cause, they have been even less willing to quantify reasonable suspicion. The officer is said to need “a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot’”¹²⁶ An anonymous tip corroborated only by police observation of innocent details in the tip falls short of this standard.¹²⁷ Presence on the streets in a high-crime neighborhood, coupled with flight from the police on sight, is enough.¹²⁸ If the police are justified in stopping the suspect, they may conduct a protective pat-down search for weapons if specific facts are present to suggest that the suspect might be dangerous.

The opportunity cost of these street encounters is relatively low. The police are still present on the street, and if they hear gunfire or someone shouting “Stop, Thief!” they can abandon their speculative encounter and address the emergency. At the scene of their deployment they produce the nonevidentiary benefits of a visible patrol presence, but unless they actually stop people they will have no evidentiary gains, unless they see an offense

(“The regular road troopers we talked to were not enthusiastic about searches in the least, and it is clear that they view unnecessary searches, in general, as a nonproductive use of their time.”).

125. 392 U.S. 1 (1968) (finding permissible a reasonable search for weapons for the protection of the police officer where he has reason to believe that the individual is armed and dangerous, regardless of whether he has probable cause to arrest the individual for a crime).

126. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

127. *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

128. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

in flagrante. From a crime-control standpoint, they have an incentive to stop and frisk the most suspicious person in the area, regardless of just how suspicious that individual happens to be.

Liability risk for *Terry* stops is also low. Because the governing law is expressed as a standard (“reasonable suspicion”) rather than a rule (no entry of private premises without a warrant, consent, or emergency), the qualified immunity defense protects all but the most egregious violations. Damages from an encounter measured in minutes are not likely to be large. So, as with warrantless searches, the primary incentive to comply with the reasonable-suspicion standard is the exclusionary rule.

If the police have enough evidence *ex ante* to make an arrest, they have no need for the *Terry* procedure. There is a small probability that the suspect will admit criminal activity. While there may be some crime-control benefit from hassling suspected gangsters in public view or dissuading the suspect from a planned but never consummated offense, a major reason for these stops is the prospect of discovering drugs or guns. The exclusionary rule’s role here is definite but limited. If the police act unlawfully they may lose their case, but the drugs or guns will still be off the streets.

Like warrantless searches, *Terry* stops were hard to study before the racial profiling controversy. The controversy has generated considerable data about police practices, but it is difficult to gauge the extent of police compliance with constitutional standards. For example, reviewing police records to determine the presence of reasonable suspicion or probable cause reveals the limitations of the records themselves. Using this approach, the New York Attorney General’s office estimated that in a sample of more than 15,000 recorded *Terry* stops, 15.4% of the records failed to establish legal grounds, and another 23.5% left unclear the legality of the police actions.¹²⁹ It has been pointed out, however, that police often have more information than time and energy to report, implying that in many cases adequate grounds were present but unrecorded.¹³⁰

Direct observations of police behavior can squarely address the frequency of constitutional violations. Jon Gould and Stephen Mastrofski conducted an observation study of police search practices in a medium-sized

129. CIVIL RIGHTS BUREAU, OFFICE OF THE N.Y. ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICE: A REPORT FROM THE OFFICE OF THE ATTORNEY GENERAL 160-62 (1999), available at http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/stp_frsk.pdf.

130. See James J. Fyfe, *Stops, Frisks, Searches, and the Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 379, 393 (2004) (“Whether and how many of these stops were, in fact, unconstitutional, is a question that will never be resolved.”).

city.¹³¹ They identified 115 searches and coded them as constitutional or unconstitutional, with doubtful cases evaluated by a committee composed of one former judge and two former prosecutors. Gould and Mastrofski concluded that thirty-four (30%) of the searches were illegal, and that in thirty-one of these cases the suspect was neither arrested nor cited, so that the case would never enter the criminal justice system.¹³² Of the 115 searches in the sample, forty-four were pat-downs under *Terry* and seventy-one were "full searches" or searches for evidence. Twenty (45.5%) of the pat downs were deemed illegal, as were fourteen (19.7%) of the searches for evidence.¹³³

This approach, however, also has at least two weaknesses. The first is that it is time-intensive and therefore costly, meaning that limited sample sizes may not produce representative results. Gould and Mastrofski, with a substantial team and a National Institute of Justice grant, generated a sample of merely 115 cases from a single jurisdiction.¹³⁴ The second is that in at least some cases, reasonable observers may disagree about the legality of the police actions.¹³⁵

This Article's focus on hit rates has its own limitation, i.e., the legality of a stop or a search does not depend on the result. Hit rates, however, have two advantages. We now have access to some large samples of data, and hit rates are more objective than professional opinions about legality. Since compliance with the reasonable suspicion standard in a large pool of cases would limit the hit rate, hit rates offer an important item of evidence in measuring compliance.

Using a larger sample of the reports reviewed by the New York Attorney General's Office, a recent RAND study of more than 500,000 reported *Terry* stops by the New York Police Department ("NYPD")¹³⁶ found that only

131. Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004).

132. *Id.* at 331-32.

133. *Id.* at 333.

134. See Fyfe, *supra* note 130, at 390 (suggesting a "replication of Gould and Mastrofski's work in an agency in which officers are more carefully trained and held accountable . . ."). To their credit, Gould and Mastrofski addressed this problem, both by coding according to certainty of legality/illegality, and by opting to code as legal in indeterminate cases. It is therefore possible that their estimate of 30% noncompliance is low, rather than high. See Gould & Mastrofski, *supra* note 131.

135. See Fyfe, *supra* note 130, at 384 ("This [research] group's assessment of what was constitutional and what was not was only marginally better than that of the police who had been observed.").

136. GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES xi (2007).

10% of these stops resulted in either an arrest or a citation.¹³⁷ The NYPD employs a particularly aggressive version of community policing, and so we might expect the New York City hit rate to be uncharacteristically low. If, however, we are interested in the influence of Fourth Amendment remedies, then we are similarly interested in how far an aggressive police department feels it may go before the costs exceed the gains. The NYPD must therefore believe that neither the exclusionary rule, nor the tort remedy, eliminates the net benefits resulting from *Terry* stops with a 10% hit rate. The reporting requirement that made the New York data possible, moreover, increases OC for stops. We might well expect the hit rate to be lower in jurisdictions with comparable police tactics but no reporting requirement. Unless reasonable suspicion means something like an outside chance, the remedial mix is underdetering illegal *Terry* stops.

The RAND data shed some interesting light on the frisk part of stop-and-frisk. The data show that the police frisked only a minority, roughly one-third, of those stopped.¹³⁸ This may be a reporting artifact, but that seems improbable given that in the other two-thirds of these cases the police took the time to fill out the form recording the stop itself. The hit rate for these frisks is quite low, with the recovery of some contraband occurring in 5.4-6.4% of frisks.¹³⁹ The numbers vary a bit across racial groups, but, roughly speaking, 1% of frisks across groups result in the recovery of a weapon.¹⁴⁰

Some contraband was recovered in 6.4% of frisks of whites, 5.7% of blacks, and 5.4% of Hispanics.¹⁴¹ The recoveries were primarily of drugs: “For every 1,000 frisks of black suspects, officers recovered seven weapons, and, for every 1,000 frisks of similarly situated white suspects, officers recovered eight weapons, a difference that is not statistically significant.”¹⁴²

What can we learn from these numbers? The very low rate at which the police recover weapons stands to reason. They face an immediate, personal, and potentially catastrophic cost if the suspect resorts to lethal resistance. The finding that the police are not frisking almost every suspect stopped is somewhat surprising. In any event it seems that if the police do fear armed resistance, the exclusionary rule is unlikely to influence their behavior.

137. *Id.* at xv.

138. *Id.* at 37 tbl.5.2.

139. *Id.* at 41-42 & tbl.5.5.

140. *Id.* at 42 tbl.5.5.

141. *Id.*

142. *Id.* at xiv.

The substantive law makes weapons but not drugs fair objects of the so-called protective search. If the exclusionary rule creates incentives that trump officer safety, overdetering justified frisks for weapons, we would expect to see much higher hit rates for weapons. The six- or seven-to-one ratio of drugs to weapons recovered might mean that the police often frisk the suspect not because they subjectively fear for their safety, but because they hope to discover illegal drugs.

The hit rate suggests that in practice "reasonable suspicion" means about a one-in-ten chance of finding anything (and a dramatically lower chance of finding one of the weapons that theoretically justifies the "protective search"). This might reflect either of two causes. One is that in ruling on suppression motions, the judges, generally following the Supreme Court's guidance, are willing to accept very little in the way of particularized suspicion. If, for example, in the case *Florida v. J.L.*,¹⁴³ the police had added to the anonymous tip a furtive gesture or evasive movements by the suspect, and characterized the locale as a high-crime neighborhood, a suppression motion would very likely have failed.

If the 10% hit rate (with much lower hit rates once open-container alcohol and personal-use marijuana violations are excluded) is really consistent with the Supreme Court's stop-and-frisk jurisprudence, the exclusionary rule is working fine in this context. It should be recalled, however, that when Indianapolis police set up road blocks to stop every vehicle, wholly without individualized suspicion, to perform canine examination and sobriety checks, the hit rate was 9%.¹⁴⁴ If "reasonable suspicion" means something more demanding, the low hit rate in stop-and-frisk cases may be due to the prominence of nonevidentiary reasons for aggressive patrol tactics, and/or judicial reluctance to drop the exclusionary hammer.

The *J.L.* case is again illustrative. Whatever happened in court, officers who get an anonymous tip that a kid is carrying a gun onto a city bus are likely to intervene. If no weapon is found, practical liability risks are next to zero. If a weapon is found, it will be confiscated even if it is later suppressed. And even if "reasonable suspicion" is dubious, if a weapon is found the courts may very well admit the evidence too. In *J.L.*, the Florida trial court granted the suppression motion, but the state appellate court reversed.¹⁴⁵ The Florida Supreme Court agreed with the trial court that the evidence should have been suppressed, but two dissenters urged an excep-

143. 529 U.S. 266 (2000).

144. *City of Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000).

145. *J.L.*, 529 U.S. at 269.

tion that would make a conclusory anonymous tip reasonable suspicion when the tip alleges the possession of a firearm.¹⁴⁶

If the first explanation, that “reasonable suspicion” is an undemanding standard, is correct, the exclusionary rule might be achieving close to optimal deterrence in stop-and-frisk cases. If the second explanation is correct, the empirical evidence suggests under, rather than overdeterrence.

4. *Police Brutality*

The worst forms of unconstitutional police misconduct—police brutality—have no EVB and so the exclusionary rule has no direct disincentive effect. Brutality does have a relatively high LC. There is enough police brutality to doubt that the tort sanction is overdetering it (recall that when illegality is certain there is no risk of overdeterrence). “The national average among large police departments for excessive-force complaints is 9.5 per 100 full-time officers.”¹⁴⁷ However one regards the present tort/crime/discipline remedial mix for police brutality, the exclusionary rule debate is largely irrelevant to the brutality problem. Abolition might signal *carte blanche* to the police and thereby encourage brutality by implication. In a rational actor model, however, abolition of the exclusionary rule would not change training or discipline with respect to police violence.

5. *Arrests*

As with police brutality, the exclusionary rule has little to do with police incentives. Evidentiary benefit is no consideration at all in most arrests. Arrests are infrequently an instrument of investigation and far more often the end-stage product. In theft cases, and buy-and-bust drug cases, the police hope to find incriminating evidence at the time of arrest. But the bulk of arrests reflect other police incentives.

Warrants for nonappearance are a substantial fraction of arrests. *In flagrante* arrests, whether for purse-snatching, public intoxication, or solicitation of prostitution, are another substantial percentage. Arrests to suppress immediate violence, especially domestic violence, are yet another significant fraction. From a departmental perspective, the expected value of arrests is almost all nonevidentiary. Either the police already have the evi-

146. *Id.*

147. Susan Saulny, *Chicago Police Abuse Cases Exceed Average*, N.Y. TIMES, Nov. 15, 2007, at A24, available at <http://www.nytimes.com/2007/11/15/us/15chicago.html>. Some complaints are false; but many citizens decline to complain because they expect no action or fear reprisal.

dence they need, or the arrest is made for social control purposes other than initiating a prosecution in court.

The exception is the so-called pretextual arrest, where the police make an arrest because they have broader search powers incident to the arrest than they have based on the probable cause or reasonable suspicion standards. In these cases, rules that clearly limit the scope of the search incident tend to discourage pretextual arrests when the suspected evidence is outside the permitted zone of search, and to encourage pretextual arrests when the suspected evidence is in that zone.

The predicate arrest must be based on probable cause, but no warrant is required except when the police need to force entry into private premises to effect the arrest. We can look to case attrition studies—studies of “lost arrests”—to see how many arrests end in conviction, and thereby construct a sort of “hit rate” for arrests. While the figures vary from jurisdiction to jurisdiction, the figure generally accepted is that half of all arrests result in a conviction and half do not. The most recent numbers are a little lower than that.¹⁴⁸ That sounds very much like probable cause.

Whether too high, too low, or just right, current case attrition figures probably are not due to the Fourth Amendment remedies mix. Tort liability for false arrest is part of the cost side of the equation, but drastically limited by qualified immunity. In some atypical cases—drug cases and perhaps a few others—the police hope to discover some evidence incident to the arrest, and in these cases the exclusionary rule may have some influence as well. If this remedial mix were over-detering we would expect to see substantially lower case attrition rates, i.e., we would expect the police to concentrate resources in cases where probable cause is clear rather than borderline. It seems more likely that Fourth Amendment remedies have negligible influence on arrests, and that police behavior is explicable largely in terms of opportunity cost.

When the police apply for an arrest warrant as part of an ongoing investigation, the opportunity cost, in terms of lost police time, resembles that of obtaining a search warrant, but is generally smaller. Bench warrants are not sought by the police, and in any event most arrests are not authorized by warrant *ex ante*. The opportunity cost of an arrest is the time it takes for

148. The Bureau of Justice Statistics reports that in 2004, the most recent data available, there were 1,100,210 arrests for selected serious felonies in the state systems, but only 466,480, or just over 42%, resulted in convictions. See Sourcebook of Criminal Justice Statistics Online, tbl.5.0002.2004, <http://www.albany.edu/sourcebook/pdf/t500022004.pdf> (last visited Apr. 26, 2010). The Table lists the offenses differently; I generated my number by summing the arrests and convictions across all offenses listed.

the police to find, subdue, and transport the offender before handing him off to the court system's lockup and write a report.

The opportunity cost of search warrants is measured in days. The opportunity cost of an arrest is measured in fractions of an hour but is still significant. If arrest serves neither immediate social control purposes, nor initiates a promising prosecution, police administrators have reasons to train the force to remain at work on proactive patrol or investigating reported offenses.

6. *Summary of the Evidence on the Overdeterrence Hypothesis*

The evidence available suggests that the current remedial mix is doing a passable job with respect to home invasions, where the rule-type warrant requirement forces the police into the costly warrant process. The evidence further suggests that, when the opportunity cost for unlawful searches or seizures is low, the current mix is not adequately deterring unlawful police actions governed solely by standards like probable cause or reasonable suspicion. This should concern civil libertarians, but there seems little cause to criticize the current remedial mix for discouraging lawful searches and seizures.

The *Hudson* majority's concern with the exclusionary rule's "substantial social costs" is at odds with the overdeterrence thesis. Perhaps most telling is the frequency with which the courts rely on exceptions to the exclusionary rule to admit evidence obtained in violation of constitutional requirements. If the tort sanction were deterring such violations, the exclusionary rule could not exact those "substantial social costs," and there wouldn't be a great deal of tainted evidence available under exceptions to exclusion. There wouldn't be many Fourth Amendment violations to support suppression motions. A judiciary that wanted to eliminate the exclusionary rule without encouraging violations of the Constitution would not do so de jure, but de facto, by crafting effective alternative remedies that make exclusion too rare to care about.

That course, exemplified by eliminating the judge-made qualified immunity defense, really does run the risk of overdeterrence. Given the prevalence of indemnification of individual officers, and the Supreme Court's extensive recognition of bright-line rules, tort liability sans immunity and sans exclusion might move us closer to optimal deterrence. Given the disconnect between tort damages and the expected gain from aggressive policing, we would also have to consider the possibility that such a regime would either underdeter (if, for example, low damages for arbitrary *Terry* stops gave police general search powers of citizens on the streets) or over-

deter (if extravagant juries brought back awards high enough to discourage the police from acting in all but clearly legal cases).

III. RIGHTS-BASED THEORIES OF THE EXCLUSIONARY RULE

Justice Ginsburg dissented in *Herring*. She argued that the exclusionary rule was necessary to deter negligent record-keeping by the police. More momentously, she criticized the deterrence-based cost-benefit analysis the Court has followed since *Calandra*. Justice Ginsburg embraced a “more majestic” understanding of the exclusionary rule, an understanding that calls for suppression even when there is little reason to expect deterrence of future Fourth Amendment violations.

Justice Stevens, Justice Breyer, and Justice Souter joined Justice Ginsburg’s opinion, so the *Calandra* approach now hangs by a thread. A change of view by one of the Justices in the *Herring* majority, or a change in the composition of the Court, could produce a majority that favors Justice Ginsburg’s approach. Her approach therefore deserves careful analysis.

That is less easy than it sounds, because Justice Ginsburg’s *Herring* dissent is both exceptionally brief and vague about just what this “majestic” view entails. The *Herring* dissent devotes only four paragraphs to criticizing the *Calandra* approach. The first paragraph, quoting Justice Stevens’s dissent in *Arizona v. Evans*, declares that the Fourth Amendment “‘is a constraint on the power of the sovereign, not merely on some of its agents.’”¹⁴⁹

The second paragraph, quoting Potter Stewart, characterizes exclusion as “‘a remedy necessary to ensure that’ the Fourth Amendment’s prohibitions ‘are observed in fact.’”¹⁵⁰ After a citation to a prominent article by Yale Kamisar,¹⁵¹ this paragraph goes on: “The rule’s service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.”¹⁵² The paragraph ends with a “see” citation to *Whiteley v. Warden*¹⁵³ and a “cf.” citation to the famous dissents of Holmes and Brandeis in *Olmstead v. United States*.¹⁵⁴

149. *Herring v. United States*, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

150. *Id.* (quoting Stewart, *supra* note 12, at 1369).

151. Kamisar, *supra* note 12, at 600 (describing *Weeks* as approving the view that loss of evidence is attributable to the Fourth Amendment rather than to the exclusionary rule).

152. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

153. 401 U.S. 560 (1971).

154. 277 U.S. 438 (1928).

The specific citation to *Whiteley* is to pages 568-69, where the *Whiteley* Court concluded that when police act in reliance on a wanted bulletin from other police, the arresting officers lack probable cause if the officers issuing the bulletin lack probable cause and the arresting officers learned nothing new before the arrest.¹⁵⁵ The only reference to the exclusionary rule is this sentence: “Therefore, petitioner’s arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial,” followed by a boiler-plate citation to *Mapp*.¹⁵⁶ This does not appear to add anything to the integration/unitary transaction view announced in the first paragraph.

The references to Brandeis and Holmes are even more puzzling. Justice Brandeis’s famous dissent in *Olmstead* followed the then-controlling *Boyd* case. *Boyd* held that the Fourth Amendment forbade any seizure of private papers, and that the Fifth Amendment forbade the use of illegally-seized papers as evidence against their owner.¹⁵⁷ The issue in *Olmstead* was whether private telephone conversations, illicitly intercepted, should be treated like papers. Justice Brandeis said that they were, in famous language.¹⁵⁸ But *Boyd* is dead.

Justice Ginsburg, presumably, is not calling for the return of *Boyd*. In Justice Brandeis’s view, *Boyd* calls for holding unconstitutional any—repeat, *any*—surreptitious electronic surveillance for law-enforcement purposes.¹⁵⁹ In any view, *Boyd* prohibits any seizure of private papers, even

155. *Id.* at 568-69.

156. *Id.*

157. *Boyd v. United States*, 116 U.S. 616 (1886).

158. *See Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.”).

159. *Entick* had held that the common law knew no warrant to search for mere evidence, and *Boyd* had held that a court order compelling production of private papers, obtained after adversary process, violated the Fourth and Fifth Amendments. Brandeis viewed private conversations as on a par with private papers (if not yet more sacrosanct), and thus beyond surveillance even under warrant. Note the inclusion of papers compelled “in the orderly process of a court’s procedure,” *id.* at 477-78, as within the rule of *Boyd*, and the inflexible conclusion of the famous right-to-be-let-alone passage that any use of the conversations in evidence violates the Fifth Amendment.

under warrant, unless the papers qualify as fruits, instrumentalities, or contraband. And while *Boyd* was understood to protect nontestimonial physical evidence (once again immune from seizure even pursuant to a valid warrant), *Boyd* did not protect tools, fruits of crime, or contraband. An exclusionary rule based on *Boyd* therefore would not reach guns or drugs, the very evidence the *Herring* dissenters would have suppressed.

Justice Holmes dissented separately in *Olmstead*. Holmes supported the Fourth Amendment exclusionary rule and himself had detached it from the self-incrimination privilege in *Silverthorne Lumber Co. v. United States*.¹⁶⁰ *Silverthorne* suppressed evidence obtained by an unconstitutional search of a corporation. Corporations have no self-incrimination rights under the Fifth Amendment. Holmes noted the point, but then declared that "the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."¹⁶¹ *Silverthorne* speaks both the language of deterrence (admissibility "reduces the Fourth Amendment to a form of words") and judicial integrity ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.")¹⁶²

Holmes took a clearer stand for judicial integrity in *Olmstead*. Even if the *Olmstead* majority was right that wiretapping does not constitute a Fourth Amendment "search," there was no doubt that the interception in that case was a crime under state law. State prosecution therefore offered at least a theoretical alternative to exclusion for deterrent purposes. Without endorsing Brandeis's constitutional argument, Holmes endorsed a version of the judicial integrity theory, as follows:

For those who agree with me no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.¹⁶³

Justice Ginsburg notably did not cite Justice Black's opinion in *Mapp*, the last defense of the exclusionary rule on self-incrimination grounds to be found in the U.S. reports (and perhaps the last, period). At that time, even those sympathetic to the exclusionary rule recognized the weaknesses of the self-incrimination theory. See Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 25-26 (noting historical, analytical, and practical weaknesses of the self-incrimination theory, and expressing skepticism about the continuing relevance of Justice Black's "individualism" on the issue).

160. 251 U.S. 385 (1920).

161. *Id.* at 392.

162. *Id.*

163. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

Dropping the inapposite invocations of *Whiteley* and Brandeis, the second paragraph condenses to adding the authority of Holmes and Kamisar to the first paragraph's announcement that the use of tainted evidence is itself forbidden by the Fourth Amendment. The third paragraph makes a different, consequentialist argument. Quoting Justice Brennan's *Calandra* dissent, the *Herring* dissenters argue that exclusion "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it 'assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."¹⁶⁴

Granting that if admission of the evidence necessarily implicates the court in a violation of the Fourth Amendment the court should refuse the evidence, what does this consequentialist point add to the case for the exclusionary rule? In a fascinating role-reversal, we see the defenders of civil liberties putting forth a sort of broken-windows type of deterrence argument. If the courts approve Fourth Amendment violations, the moral message will encourage illegal behavior by both police and citizens.

Clearly enough this is an empirical claim, and similarly clear is that it is put forth as an article of faith rather than a proposition to be tested empirically. Even those who endorse this sort of systemic deterrence idea, however, might well lose their faith when they consider that one consequence of the exclusionary rule has been the proliferation of police perjury. No one can quantify it, but there is widespread belief that police not infrequently testify untruthfully at suppression hearings and that judges not infrequently credit (I do not say "believe") their testimony.¹⁶⁵

If exclusion is thought to encourage police to turn square corners, and the most immediate reaction to this moral message is perjury, one might be inclined to rethink the sending of this moral message. Likewise, citizens who see evidence admitted based on unlikely police testimony will be receiving a very different moral message than the one the *Herring* dissenters want to transmit.

164. *Herring v. United States*, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (alterations in original) (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

165. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 80-81 (1992) (using a study conducted on Chicago policemen to illustrate higher instances of perjury in instances of Fourth Amendment violations). Orfield also found that "[m]any respondents commented that to the extent a tort remedy would actually impose damages on police officers, it would cause the police to perjure themselves even more frequently." *Id.* at 126.

At one point I took the view that police perjury reflected the failure of typical trial judges to meet the standard set by Holmes and Brandeis. That, however, is an impossible standard to expect. Given the judges we are likely to have, it is a fair point against the exclusionary rule that the release of an obviously guilty offender is so unpalatable that judges will resort to unsavory expedients to avoid that result.

The final paragraph of the *Herring* dissent's critique of *Calandra* tersely but correctly asserts the inadequacy of other remedies for Fourth Amendment violations. If we strip away the ghostly echoes of *Boyd* and the problematic moral-message argument, Justice Ginsburg's case for a "more majestic" view of the exclusionary rule reduces to the argument that admitting tainted evidence should be regarded as forbidden by the same constitutional provision that prohibits the search.

This position has distinguished defenders.¹⁶⁶ It also has a variety of related weaknesses. First, it does not speak to illegal searches or arrests that produce no evidence (to which, for simplicity, I will refer to as searches of the innocent, even though that label is not perfectly accurate). Second, it does not account for alternative remedies, including the application of an exclusionary rule designed solely for deterrent purposes. Third, all such theories seem inconsistent with the qualified immunity defense to tort suits against police for Fourth Amendment violations. Fourth, unitary transaction theories misunderstand the nature of the rights protected by the Fourth Amendment.

Begin with the case of the innocent search victim. On a unitary-transaction account, the courts are just as involved in an unfruitful illegal search as in a fruitful legal one, as the purpose of the search is to discover admissible evidence. I assume that equity and integrity *can be* satisfied by something other than exclusion. Otherwise the government would need to do something like offer innocent victims of illegal searches the right to pull pending indictments against third parties out of a hat to be dismissed. If the government has done for the guilty whatever is enough to satisfy its duties to the innocent, there seems no reason to go further and suppress the evidence against the guilty.

166. See TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 236-52 (Antony Duff et al. eds., 2007) (arguing that the integration principle, i.e., unitary transaction theory, and "moral standing of the trial" may call for excluding improperly obtained evidence); Kamisar, *supra* note 12, at 590-97 (advancing the principle of judicial review as a justification for exclusion); Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 257-60 (1974) (characterizing search and use of evidence at trial as a "unitary transaction," and defending the exclusionary rule as a necessary form of judicial review under *Marbury v. Madison*).

Suppose the police, without a warrant, consent, or exigency, break into the apartment of A and B. In A's bedroom they find nothing; in B's bedroom they find illegal drugs. A's only judicial remedy is a tort suit. If that suit satisfies Fourth Amendment requirements for the innocent, why is it not enough for the guilty?

The problem of innocent search victims necessarily leads to consideration of alternative remedies. To take an extreme example, suppose again that the police find illegal drugs during an illegal search. Now suppose (this is counterfactual but illuminating) that the responsible officers have been charged criminally, convicted, and sent to prison before the court rules on the suppression motion.¹⁶⁷ Has the government not done enough to cleanse its hands and dissociate itself from the unlawful search? Has it not done enough to express its disapproval of its agents' conduct? It has done all it could do, if the defendant were innocent. Must it do even more for the guilty?

Familiar criminal-law principles of complicity suggest otherwise. Suppose A says to B: I will pay you \$100 for every illegal weapon you turn in to me. If, however, you steal the guns, or break into private premises for them, I will still pay you the money, but I will also prosecute the case to the fullest extent of the law. If B commits a crime to collect guns for the buy-back program, is A complicit? If A is in earnest and credible, A neither intends for B to commit the offense, nor, all things considered, encourages it or aids it.

Up until *Boyd* in 1886, U.S. courts appear to have upheld the common-law rule that illegality in the search or the seizure did not bar proof at a

167. This is the example alluded to in TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL, *supra* note 166, at 228, as a reason for rejecting deterrent theories of exclusion. As the authors state there, "when considering whether wrongfully obtained evidence should be excluded, the relevant comparator terms of deterrent effect is not failing to respond to the wrong, but rather using alternative sanctions for the wrong." *Id.* No explanation is later given why this is not also the "relevant comparator" for assessing judicial complicity in the prior illegality or the "moral standing of the trial."

One problem with deontological approaches is that they invite recharacterization of countervailing considerations as rights-claims. Professor Pettys's contribution to this Symposium takes such a tack. See Todd Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837 (2010). I have grave doubt about whether this exceptionally creative turn is convincing, as it calls into question not just all exclusionary rules unjustified by reliability considerations (such as the rules against proof of subsequent remedial measures in civil cases, or proof of statements made during plea negotiations in criminal cases), but also seems to call into question settlements *qua* settlements, at least those entered into after the jurors are sworn. I may have misunderstood Professor Pettys's claim, but his article illustrates that those who recognize deontological entitlements to exclusionary rules of evidence must also fend off claims of conflicting rights to truth in adjudication. See *id.*

criminal trial.¹⁶⁸ Indeed, it was thought a point against exclusion that this would require going into a "collateral issue!"¹⁶⁹ For the first ninety years of the Republic, search and use were *not* thought of as a unitary transaction, and judicial integrity was *not* thought to require rejecting tainted evidence in court. Instead, what we think of as the "alternative" tort remedy was supposed to be the main, and quite adequate, relief for illegal search and seizure. The atrophy of the tort remedy indeed requires some new remedy with deterrent power. The claim that the Fourth Amendment itself requires exclusion as a natural or inevitable component, however, is a modern contrivance.

Nondeterrent theories have a further weakness: they conflict with the qualified-immunity defense to tort actions under *Bivens* and 42 U.S.C. § 1983. Suppose in our initial hypo the police applied for a warrant, and a judge mistakenly concluded that the affidavit established probable cause. Suppose A, the innocent roommate, now brings suit, and the officers move for summary judgment, claiming the immunity defense. If the court grants judgment for the defendant, as the law now requires, nothing will happen about the illegal search of A's room. The court will turn the innocent victim of a constitutional violation away from the courthouse. If equitable principles or judicial integrity require suppressing B's drugs, regardless of the consequences, they also point toward awarding A damages, regardless of the consequences.

A robust tort remedy risks genuine overdeterrence. So the immunity defense is understandable;¹⁷⁰ it is just not understandable from the standpoint of equity or judicial integrity.

168. *See, e.g., Commonwealth v. Dana*, 43 Mass. 329, 337 (1841) ("There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were.").

169. *Id.* ("When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.").

170. *See Posner, Excessive Sanctions, supra* note 93, at 640-41 ("[T]he tort approach has its own problem of overdeterrence. . . . We can fix this problem by immunizing police officers from tort liability, thereby externalizing some costs in order to eliminate a disincentive for the police to produce external benefits. But can we do this without also underdetering police misconduct? We can—by ensuring that an officer's immunity for misconduct (committed in good faith) is not extended to the agency employing him."). Judge Posner's proposal, however, has not been adopted. In practice, the police employer agrees to defend-and-indemnify the individual officers, who do have qualified immunity to prevent overdeterrence. There is, however, no general rule of entity liability. *Monell v. Dep't of Soc.*

The final point, implicit in the first two, is that Fourth Amendment rights do not trump substantive laws against possessing drugs or weapons. Again, suppose the police enter and search the apartment of A and B without a warrant. Suppose the police find drugs in B's room but not in A's. A and B sue the police for damages. Should B's recovery be higher than A's? Surely his consequential damages are greater. Yet it seems wrong on principle to say that criminals enjoy greater Fourth Amendment rights than law-abiding citizens, or that the Fourth Amendment creates a constitutional right to commit murder in soundproof rooms.¹⁷¹

Given that we do not return contraband, or increase damages for illegal searches that discover contraband, the exclusionary rule really is detached from the prior search. The defendant is allowed to suppress because only in this way can the court protect the Fourth Amendment rights of persons unknown, who would suffer constitutional violations in future cases if the court received the evidence. As in the classic third-party standing cases like *Craig v. Boren* or *Barrows v. Jackson*,¹⁷² assertion of the claim by the right-holder is impracticable. The tort action has atrophied, and there is no sentiment in the court, or in legislatures, for revitalizing it.

Deterrence is a perfectly sound explanation for the exclusionary rule. The emergence of professional police forces in the nineteenth century depended on immunity from traditional tort liability, whether that immunity was recognized de jure or de facto. With the atrophy of the trespass and false-arrest actions the founders had known, police behavior was virtually lawless. The Fourth Amendment, like most constitutional provisions, says nothing about remedies. If the federal courts have a duty to enforce a constitutional provision, and no adequate statutory or common-law remedies exist, then the federal courts also have discretion to fashion an appropriate

Servs. of N.Y., 436 U.S. 658, 690-91 (1978). If the individual officers are not personally liable, they owe no damages, and so the employer's indemnification agreement requires no payment for damages.

171. If we are living in the '80s, as this "new" debate suggests, I might as well repeat something I said then, and is no less true now:

The evil of the search lies not in the discovery of criminal evidence, but in the concomitant exposure to the government, and thereby the world, of all those tell-tales of personality revealed in any place we take for private. To view the exclusionary rule as a personal right is to constitutionally enshrine the pistol in the basement or the cocaine in the coffee can, and to ignore as immaterial the music on the stereo, the books on the shelf, and the fading letters in the bedroom bureau drawer.

Dripps, *supra* note 113, at 920-21.

172. *Craig v. Boren*, 429 U.S. 190, 195-97 (1976) (allowing brewers to raise equal protection rights of consumers); *Barrows v. Jackson*, 346 U.S. 249, 257-58 (1953) (allowing white seller to invoke equal protection rights of black buyer while defending action on racially restrictive covenant).

mix of remedies. Defenders of this view include Roger Traynor, Potter Stewart, and Anthony Amsterdam. As we have seen, exclusion does encourage police compliance and, in all probability, does not overdeter in the normatively appropriate sense of the term.

As Professor Amsterdam observed long ago,¹⁷³ and Professor Alschuler noted in analyzing the causation issue in *Hudson*,¹⁷⁴ deterrence is not incompatible with suppressing evidence that was obtained without violating the rights of the instant defendant. Indeed, there need be no violation of the Fourth Amendment in the instant case at all.¹⁷⁵ For deterrent purposes the correct inquiry into causation is prospective, not retrospective. Target standing is just as logical as any other application of the exclusionary rule.¹⁷⁶ Professor Amsterdam's proposal to exclude drugs found during legal frisks for weapons under *Terry* is doctrinally more radical but likewise a logical disincentive to illegal stops and frisks.¹⁷⁷

Overdeterrence again poses a countervailing consideration. Suppose the government were required to dismiss fifty cases whenever the defense won a suppression motion. This would deter like hell, and not all for the good. The government would then train the police force to avoid all but the most clearly legal searches.

Consider another hypothetical case, this one based on *Walder v. United States*.¹⁷⁸ Suppose the police arrest D without probable cause, and find illegal drugs on his person in the search incident to the arrest. D successfully moves to suppress and the case against him is dismissed. A year later, D is

173. See Amsterdam, *supra* note 34, at 437 (“[U]pon a proper regulatory view of the fourth amendment and its implementing exclusionary rule, there is no necessary relationship between the violation of an individual’s fourth amendment rights and exclusion of evidence.”).

174. Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1764 (2008) (“For more than forty years, the Court has denigrated ‘rights’ theories of the rule and contended that exclusion never vindicates the interests of the defendant before the court. The Court has insisted that exclusion is always what the *Hudson* Court said it never can be—a windfall awarded to a defendant for the sake of protecting the rights of others.”).

175. See Amsterdam, *supra* note 34, at 437 (suggesting “a rule excluding from evidence everything that an officer finds in the course of a ‘frisk’ except weapons” in order to discourage frisks initiated for the subjective purpose of finding narcotics as opposed to weapons).

176. See *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955) (“[I]f law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified.”). Justice Traynor’s view was rejected by the U.S. Supreme Court, and later, by the California voters. The Supreme Court, however, has adopted a theory of the exclusionary rule that comports with Justice Traynor’s argument for target standing, and has never satisfactorily answered his reasoning.

177. See Amsterdam, *supra* note 34, at 437.

178. 347 U.S. 62 (1954).

arrested after buying illegal drugs from an undercover agent. D claims entrapment. The government offers to prove predisposition with proof of the seizure the year before.

In this case, the government already has lost one case against the defendant and the defendant has not done anything wrong in defending the second case (unlike Walder, who perjured himself on the stand at the second trial by claiming that he had never had anything to do with drugs). Do equitable principles or judicial integrity require excluding the evidence in the second case? My intuition is that there is no good reason to exclude the evidence in the second case.

Another excellent test case is *Calandra*.¹⁷⁹ Following the illegal search, Calandra was called to testify before a grand jury. When he claimed Fifth Amendment immunity, the government issued a *transactional* immunity order. He nonetheless asserted a Fourth Amendment right not to answer questions when the factual predicate for the questions was the prior illegal search. Just as in *Walder*, the government lost the case that the tainted evidence might have made. Going further with exclusion would not have restored the privacy lost during the illegal search, nor would it have discouraged subsequent violations.

We have the exclusionary rule not because it is a necessary remedy for Fourth Amendment violations, but because it is the possible remedy with the least combined risk of underdeterrence and overdeterrence. Many remedies, like liquidated punitive damages, could deter (and satisfy other remedial objectives such as judicial integrity), but only at the risk of overdeterrence. Other remedies can be modified to avoid overdeterrence, but only by making them toothless (the immunity defense to tort suits is illustrative).

In search-for-evidence cases, exclusion comes tolerably close to setting the government's expected gain from illegal searches at zero, and thus rationally mediating the risks of over and underdeterrence. This account is convincing, so far as it goes, but it neglects the liberal critique of the exclusionary rule for being less effective than a statutory alternative and for encouraging judges to twist both the facts and the law to avoid freeing the manifestly guilty. The traditional exclusionary rule is not optimally deterring warrantless police actions with low opportunity costs, such as violations of the stop-and-frisk rules under *Terry v. Ohio*. This reinforces criticisms of the exclusionary rule made by those to the left of the *Hudson* and *Herring* majorities, such as Judge Calabresi¹⁸⁰ and Professor Slobogin.¹⁸¹

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

180. See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003).

181. See Slobogin, *supra* note 84.

Despite hostility to the exclusionary rule, and any number of proposals for reform, legislatures have not acted to provide alternative remedies.¹⁸²

In a prior article I argued for giving judges the option of suppressing evidence contingent on the failure to pay damages.¹⁸³ This approach might overcome the psychological disadvantage of the exclusionary rule without risking overdeterrence. If the entity employing the police regarded the damage award set as the alternative to exclusion as excessive, it could acquiesce in exclusion. Judges, however, probably would be more willing to grant suppression motions, on both the facts and the law, if they knew that the government had an escape hatch. Presumably the government would be most willing to pay when the tainted evidence implicated especially dangerous offenders.

The contingent exclusionary rule concept bypasses many of the weaknesses of traditional tort suits, but a different procedural vehicle by itself cannot solve the valuation problem that explains why judges and legislatures have permitted the atrophy of the tort remedy against police. Suppressing evidence contingent on the failure to pay damages thus takes a different route to the same dead end as traditional tort remedies. If the judges set damages too low, the government would always pay the damages, leading to a world much like the one that prevailed before *Mapp*. If the judges set damages too high, the government would always choose suppression, and contingent exclusion would have changed very little besides adding a layer of procedural complexity.

What if, however, the government responded to a successful suppression motion by pointing to specific remedial steps, such as a new training program, a record-keeping program for stop-and-frisk or traffic stops, or disciplinary actions against the responsible officers such as reprimands, reassignments, demotions, or suspensions? In this scenario, the threat of

182. See, e.g., Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1616-17 (1996) (noting proposals by Caleb Foote, Richard Posner, and Warren Burger); Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2303 (1998) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) ("Nonetheless, in the current political environment, the chance of replacing the exclusionary rule with a truly effective network of civil remedies is close to zero."); cf. POLMAR & GRESHAM, *supra* note 99 (analyzing legislative incentives). A decade after publication, Professor Slobogin's alternative remedial scheme, see Slobogin, *supra* note 84, has not been adopted by any legislature. The apparently inexorable pressure of political incentives, no matter how clearly documented, nonetheless does not prevent yet additional calls for legislative alternatives. See Samuel Estreicher & Daniel P. Weick, *Opting for a Legislation Alternative to the Fourth Amendment Exclusionary Rule*, 78 U.M.K.C. L. REV. (forthcoming 2010).

183. See Dripps, *supra* note 17.

suppression might deter at least as effectively as the executed threat. I call the basic idea “virtual deterrence.”

IV. VIRTUAL DETERRENCE

As we have seen, a rational police agency will change its operations to reflect the ways the exclusionary rule changes its incentives. The very existence of the rule encourages the agency to conduct training programs in Fourth Amendment law, and to monitor and discipline officers. When the courts grant suppression motions, this reinforces the general incentive and provides information to the force about that specific incident.

What, exactly, do we want the police agency to do in response to successful suppression motions? That depends on the nature of the Fourth Amendment violation. If the officers did not know the limits on their authority, we want their employer to train them, and others with similar duties, so that they do understand the law.¹⁸⁴ Mandatory retraining may also have a punitive effect; think about traffic school as a sentence for driving offenses. If the officers knew the law and broke it deliberately, we want the force to impose some sort of disciplinary sanction.¹⁸⁵

Sanctions against the offending officers have familiar purposes. We want to deter these officers, specifically, from repeating their misconduct; we want to deter other officers, generally, from similar behavior; and when discipline takes the form of reassignment or dismissal, we want to incapacitate the individual officers from future transgressions.

The present arrangement relies on the police agencies themselves to estimate the levels of training and discipline that will maximize the value of the institution’s resources. If the police were not trained and disciplined

184. See, e.g., Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977) (“[K]ey to the rule’s effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the [Constitution] and emphasize the need to operate within those limits.” (citation omitted)). Professor Slobogin is skeptical about the success of police training programs. See Slobogin, *supra* note 84, at 393. The record of police responses to *Mapp*, and to various specific changes in Fourth Amendment law, see Dripps, *supra* note 17, at 14, suggests exclusion influences police behavior, and it is hard to see how training could play no part in improved compliance. On the other hand, if the studies Slobogin cites turn out to be correct, so that sanctions rather than training are the only way to improve compliance, virtual deterrence can adjust to this reality by conditioning admissibility on discipline rather than education. So long as there is *some* administrative response that *does* discourage future violations, virtual deterrence can incorporate that policy response.

185. See Orfield, *supra* note 165, at 80 (Chicago narcotics officers reported that both superiors and peers were involved in individual officers’ suppression rulings; frequent loss of evidence in suppression hearings could result in reassignment and bad faith violations might lead to dismissal in extreme cases).

with respect to constitutional standards at all, the force would lose many cases that might have been made with better police practices. On the other hand, resources spent on police training are resources taken from other uses such as proactive patrol, and officer sanctions may induce undue passivity. As we have seen, properly understood, there seems now to be more underdeterrence than overdeterrence of Fourth Amendment violations.¹⁸⁶

A. Virtual Deterrence: The Basic Idea

Suppose that present exclusionary-rule practice were modified by bifurcating the substantive Fourth Amendment question and the remedial question. If the court hearing a suppression motion found a violation of the Fourth Amendment, it might be required to consider the specific steps, undertaken by the police department and/or the prosecutor's office, by way of training and/or discipline, to prevent recurrence of the violation. If the court concluded that these measures were adequate and reasonable, it could admit the evidence. At least in theory, virtual deterrence might function as well as (perhaps even better than) the exclusionary rule, but also might cash in on the government's evidentiary windfall without risk of overdeterrence.

To begin with the overdeterrence point, if the employing entity concluded that the specific remedial measures demanded by the court called for an undue commitment of scarce resources, or threatened individual officers with undue incentives for passivity, these executive branch officials could refuse to undertake the remedial measures (and thereby accept some responsibility for the loss of evidence that would then result). The government could not be made worse off than it stands under the order suppressing the evidence.

As for the adequacy of the specific remedial measures, it is of course only a predicted consequence of exclusion that police departments undertake such measures now. If the linkage between remedial measures and exclusion is simply one of the incentives, suppressing the evidence *after* the remedial measures have been taken makes no sense. Indeed, in a case like *Herring*, virtual deterrence improves on both the majority and the dissent. The majority sacrifices any incentive to reform for the sake of the conviction. The dissent sacrifices the conviction for the sake of a signal it cannot guarantee leads to reform. Virtual deterrence demands actual reform from the government, and would stand a decent chance of getting it.

If the government already has taken the steps we want exclusion to encourage, the exclusionary rule has served its purpose by a threat that need not be executed. Recall the hypothetical case of the suppression motion

186. See *supra* Part II.C.

made by a defendant after the transgressing officers have been prosecuted and jailed. Another helpful analogy is to practice under Federal Rule of Evidence 407,¹⁸⁷ which bars proof of *subsequent* remedial measures to prove tort liability. The rule is designed to avoid deterring tortfeasors from taking steps to reduce the likelihood of future accidents.¹⁸⁸ Accordingly, it does not bar plaintiffs from proving remedial measures undertaken *before* the accident giving rise to the instant suit.¹⁸⁹ Like Rule 407, virtual deterrence welcomes relevant evidence as soon as the remedial measures that exclusion is intended to encourage have in fact been implemented.

For purposes of illustration (as well as to show that virtual deterrence does not depend on the court's particular jurisdiction vis-à-vis the locus of the Fourth Amendment violation or the investigating officers), reconsider *Herring*. Bad records in Dale County caused officers in Coffee County to make a groundless arrest. The fruits of the search incident to that arrest were the basis of prosecution in federal district court.

Under current law, the magistrate and the district judge had to choose between suppression and doing nothing, and chose to do nothing. Virtual deterrence offers a third option. Before accepting the magistrate's recommendation, the district judge might have asked the assistant prosecuting the case to submit an affidavit from the Dale County Sheriff indicating what steps, if any, had been undertaken to improve the record-keeping system that was causing arbitrary arrests. If no such affidavit were forthcoming, or if in substance it said nothing was going to be done, the judge should have granted the suppression motion. But something probably would be done; the Alabama authorities obviously wanted Herring put away. And if nothing were done, suppression would convey to other offices that there was no law-enforcement advantage in shoddy accounting.

B. Pros and Cons

There are two important and related advantages to virtual deterrence. The first is that evidence would not be lost. It is a mistake to treat the loss

187. FED. R. EVID. 407.

188. *See, e.g.,* Flaminio v. Honda Motor Co., 733 F.2d 463, 469-70 (7th Cir. 1984) (holding that the rule's anti-deterrent policy applies in strict-liability actions as well as negligence actions). The majority of the circuits took this position, and it was subsequently written into the text of the Rule in 1997.

189. *See* FED. R. EVID. 407 advisory committee's notes ("The amendment to Rule 407 makes two changes in the rule. First, the words 'an injury or harm allegedly caused by' were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the 'event' causing 'injury or harm' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product.").

of the evidence as a cost distinct from the costs of the Fourth Amendment.¹⁹⁰ But the loss of the evidence *is* a cost. The Fourth Amendment commands that this cost be borne because the benefits of protecting liberty and privacy *in a pool* of cases exceed the costs of the evidence that thereby goes undiscovered.

The Fourth Amendment, however, once violated, cannot be complied with retroactively. When the veil of privacy is pierced in a single case, it is no longer part of a pool. What the Fourth Amendment protects is liberty and privacy, not immunity from the substantive criminal law. Suppose D is driving home drunk, and is at fault in a collision with a car driven by P. P, it turns out, has just burgled D's house, and the collision forces open P's trunk, revealing D's computer and flatscreen television.

If law could, it would undo the injuries and the damage. It cannot, so D owes P compensation for his injuries and the damage to his vehicle. D also is subject to criminal prosecution for purposes of general deterrence and possible reformatory treatment or education. Surely, however, D is entitled to the fortunate recovery of his own possessions. And P, once out of the hospital, will be prosecuted for burglary.

Victims can be compensated, and police can be deterred. That is all that law can do. At least that is all it can do for the innocent, and it should not do more for the guilty. If due steps are taken to ensure compliance in the future, the court and the executive authorities have satisfied their constitutional obligations in response to a Fourth Amendment violation. Defendants would not lose their right to tort suits to compensate them for the loss of their legitimate liberty or privacy interests. The guilty would have the same remedies as the innocent.

The second advantage relates to the first. If a ruling on the substantive Fourth Amendment question did not automatically trigger suppression, but only left the ball in the executive's court to propose appropriate remedial measures, judges would be less biased against holding police action illegal. Evasions and fabrications would no longer be necessary to avoid the escape of the guilty.

For low-cost police practices with substantial nonevidentiary benefits, such as stop-and-frisk, the exclusionary rule is only a weak deterrent. Nonetheless, to ensure the admissibility of evidence in particular cases, especially high-value cases, the executive authorities might agree to systemic reforms, such as record-keeping of the New York type, that the traditional exclusionary rule has not encouraged. Virtual deterrence might produce a

190. See *supra* Part II.A.

higher measure of compliance with constitutional requirements than the current exclusionary rule.

There are at least two problems with virtual deterrence. The first is whether the defense would still have incentives to litigate suppression motions. If the government routinely proposed a standard one-hour retraining session for the officers involved, and this were accepted by the courts, then the effect of the proposal would be to abolish the exclusionary rule *de facto*. The adequacy of the government's proposed remedial measures would be determined in the first instance by the same trial judges who currently grant a significant number of suppression motions, and appealable to the same courts that maintain the exclusionary rule, so that outcome seems unlikely.

It seems more likely that the judiciary would welcome the option of protecting Fourth Amendment rights without suppressing evidence. These are the same judges we trust with other constitutional rights. They likely would insist on steps the government declines to take often enough to induce defendants to continue making suppression motions.

The remaining problem for virtual deterrence is monitoring compliance. The rules of criminal procedure do not provide for consent decrees! Yet the gist of virtual deterrence is to convert the traditional suppression motion into a kind of institutional reform litigation. Suppose the court finds that the government's proposed remedial steps are adequate. How does the court verify compliance?

A representation that the individual officers responsible for the violation will undertake ten hours of retraining might mean, in practice, that the officers spend ten hours at a sports bar grousing about the judge. Reassignment might mean, in practice, reassignment to a choicer post. Suspension might mean, in practice, a paid vacation. Reprimands may be accompanied by invisible—but very real—asterisks.

These problems are real, but not entirely insurmountable. For example, if additional training were administered by persons or institutions outside the police organization, such as the prosecutor's office, the judges themselves (perhaps retired, to avoid any possible conflicts), or law professors (education might be a two-way street in that variation!), the instructing party could verify the participation and cooperation of the police.

Direct sanctions typically require a formal process by which public employees can appeal some decision of the employer.¹⁹¹ The labor-law

191. Often there is a collective bargaining agreement ("CBA") between the employer and the officers, with a provision for arbitration. *See, e.g.,* Whittie v. Doyle, 228 F. App'x 512 (6th Cir. 2007) (arbitration hearing resulted in findings adverse to plaintiff, who then sued on free-speech-retaliation grounds). With or without a CBA, due process guarantees te-

process creates a record that would enable monitoring. That process takes time, and it might result in factual findings different from those made by the criminal court that suppressed the evidence. The suppressing court could accept the government's undertaking even though the disciplinary steps might be undone by the labor-law process, or it might insist on a final determination of the disciplinary matter before admitting the evidence. In short, monitoring would be a challenge that could be addressed only with some increase in procedural complexity, but it is not a decisive objection to virtual deterrence, given the advantages of the new approach.

C. The Bottom Line on Virtual Deterrence

In two situations, the problems of defense incentives and monitoring compliance might nonetheless leave intact a very good case for virtual deterrence. The first of these is grafting the virtual-deterrence idea onto proposals for recognizing an exception to the exclusionary rule when the charged offense is especially grave.¹⁹² These are relatively rare to begin with, and they now generate strong pressures to nullify the exclusionary rule by such moves as crediting implausible police testimony or finding inevitable discovery.

In a homicide case like *Massachusetts v. Sheppard*¹⁹³ or a major drug case like *United States v. Bayless*,¹⁹⁴ a judicial option to declare the search illegal but accept an official commitment to undertake additional training for the individual officers or the force generally would probably yield higher compliance with the Fourth Amendment than now prevails. It could not overdeter as the government could decline the conditions and accept suppression. With decades in prison at stake, defense attorneys would still

nured employees a hearing before termination. *See, e.g.,* *Urban v. Tularosa*, No. 97-2292, 1998 WL 694465, at *4 (10th Cir. Oct. 6, 1998) (police officers "with a property interest in continued employment" are entitled to pre-termination notice and the opportunity to defend). Due process does not appear to require a hearing before reprimands of record that do not adversely change the employee's stature or compensation. *See* *Bloodworth v. City of Phoenix*, 26 F. App'x 679, 682 (9th Cir. 2002).

192. *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (urging exception for "treason, espionage, murder, armed robbery and kidnapping by organized groups"). For a review and critique of similar proposals, see Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987). For the suggestion that seriousness-of-offense factors into substantive Fourth Amendment doctrine, see Stuntz, *supra* note 92, at 866.

193. 468 U.S. 981 (1984) (admitting evidence of homicide found during search authorized by hastily-modified form narcotics warrant that was not altered to particularly describe the evidence of the homicide described in the officer's affidavit).

194. 913 F. Supp. 232 (S.D.N.Y. 1996) (granting motion to suppress thirty-four kilograms of cocaine and two kilograms of heroin found as result of challenged *Terry* stop), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996) (Judge Baer reversed himself after public furor).

move to suppress. The court's conditions might be unacceptable to the government, and the adequacy of those conditions could be an issue on appeal.

The second situation includes categorical exceptions recognized by current law that permit use of tainted evidence in the government's case-in-chief. The current exceptions to the exclusionary rule are predicated on the assumption that exclusion is either unnecessary or futile from the standpoint of incentives for compliance. At least when the theory is that there are countervailing incentives favoring compliance, so that exclusion is not necessary, it makes sense to require the government to prove the remedial steps it has taken before the court receives evidence under the existing exceptions. Consider three such categorical exceptions: standing, good faith, and inevitable discovery.

In the standing context, the search victim's right to suppress is said to provide adequate deterrence, even when, as in *United States v. Payner*, the agents deliberately violated the victim's rights with the purpose of exploiting the standing doctrine to incriminate the target.¹⁹⁵ But why speculate about adequate deterrence, as opposed to inquiring directly into what steps the government has taken to prevent recurrence of the illegality? Remedial measures are something that can be documented. If the government takes the position that adequate deterrence has been achieved, it should be able to point to the steps it has taken. In "good faith" cases this might call for additional training; in "bad faith" cases where the police knowingly broke the rules it might call for disciplinary sanctions.

Inadequate monitoring is no objection here, because we are comparing virtual deterrence, with at least some representations and documentation, to *assumed* deterrence, with no representations or documentation at all. Likewise, current law gives the defense no incentive to raise constitutional *jus tertii* claims, regardless of how flagrant the government's misconduct may be.

The good-faith exception for the fruits of erroneously-issued warrants does not result in underdeterrence, because the opportunity costs of search warrants give the police very strong incentives to comply with the probable cause requirement quite aside from the risk of lost evidence.¹⁹⁶ When, however, the police rely on faulty records, whether kept by the courts, as in *Evans*, or by the police themselves, as in *Herring*, there is no similar disincentive against casual record-keeping practices that increase the scope of

195. 447 U.S. 727 (1980) (holding admissible against defendant papers stolen from X, defendant's accountant, by surreptitious warrantless entry of X's hotel room). The actual facts are even more unsavory than the pallid parenthetical suggests.

196. See *Dripps*, *supra* note 113, at 929.

police power.¹⁹⁷ In *Herring*, for example, it appears that the police were bent on pinning whatever they could on one of the usual suspects and asked about outstanding warrants for the purpose of searching Herring's car incident to arrest.

The *Herring* majority appears to take the view that Herring was illegally arrested but that this constitutional violation is too trifling to merit any remedial action whatsoever. If the premise that the arrest was illegal is true, the conclusion seems impious. At the least, before admitting the evidence, the court hearing the suppression motion ought to inquire about what steps have been taken to prevent recurrence. If the answer is "none," the case can hardly be classified as one of good faith.

Herring illustrates one positive potential of virtual deterrence. Like dry-hole *Terry* stops, arrests based on bad-arrest records typically do not result in evidentiary fruit. When, however, the police get really lucky, the exclusionary rule gives the judiciary some systemic leverage. Conditioning the admissibility of the evidence against Herring on improved record-keeping procedures might have induced administrative improvements that would have prevented the illegal arrests of many innocents. Likewise, attaching strings to the admissibility of the massive drug seizure in *Bayless* could have led to systemic changes like record-keeping or reevaluation of police doctrine and training regarding stop-and-frisk generally. If the reforms demanded by the judiciary are, in the judgment of law enforcement officials, not worth the resources or the incentive to passivity, the government could acquiesce in the suppression order.

The inevitable discovery is thought to be justified because not admitting tainted evidence that would have been lawfully discovered anyway "would put the police in a worse position than they would have been in if no unlawful conduct had transpired."¹⁹⁸ Deterrence does not suffer because "[t]he need to adduce proof sufficient to discharge its burden, and the difficulty in predicting whether such proof will be available or sufficient, means that the inevitable discovery rule does not permit state officials to avoid the uncertainty they would have faced but for the constitutional violation."¹⁹⁹ If inevitable discovery were factually transparent the doctrine might make

197. See LaFave, *supra* note 79, at 12 ("Perhaps the unstated assumption is that deterrence by way of the exclusionary rule is not needed with respect to negligent violations of the Fourth Amendment (or some species of them) because a sufficient level of deterrence is provided by some other force."). As LaFave points out, the only candidate for some such countervailing incentive is police professionalism, but that impulse is general rather than specific to police record-keeping, and is in any event in substantial measure a product of the exclusionary rule. See WALKER, *supra* note 63.

198. *Nix v. Williams*, 467 U.S. 431, 445 (1984).

199. *Id.* at 457 (Stevens, J., concurring).

sense. The risk is that courts will find inevitable discovery on dubious facts to avoid suppressing evidence, especially in serious cases. The availability of the virtual deterrence option in serious cases might encourage a more skeptical attitude toward inevitable discovery claims. The Supreme Court itself, for instance, might reconsider the question whether the preponderance standard, rather than the clear-and-convincing standard, ought to apply.²⁰⁰

In sum, virtual deterrence might cut the albatross of hard cases from the neck of judges ruling on suppression motions. In typical cases involving drug possession or low-level dealing, the idea is probably not worth the additional procedural complexity. In two kinds of cases, however, virtual deterrence might come closer to optimal deterrence than current doctrine. In major cases, the de jure application of the exclusionary rule is often nullified de facto. In standing cases, and good faith cases outside the warrant context, the exclusionary rule does not apply de jure now, based on speculative calculations of its deterrent impact. In both types of cases, virtual deterrence might spur remedial steps when none now occur, and it might also encourage more judicial enthusiasm for the Fourth Amendment rights of the innocent, who rely on the guilty to regulate the police.

CONCLUSION

The “new” exclusionary rule debate has nothing new in it. The current Supreme Court majority subscribes to a normatively unsound, and empirically unsupported, concept of overdeterrence. The *Herring* dissenters invoke a conception of judicial integrity that mistakes the nature of Fourth Amendment rights by demanding more for the guilty than is due to the innocent.

Rigorous application of the normatively sound view of optimal deterrence of Fourth Amendment violations calls for a different analysis and, probably, very different results in the *Calandra* line of cases. Justice Ginsburg’s dissent suggests that this kind of rigor might—just might—return to the Supreme Court, but transferring that rigor to the courts hearing suppression motions is a less likely contingency.

If the point to exclusion is deterrence, it makes sense to ask what remedial steps the government has taken in response to a violation before suppressing the tainted fruit. For administrative reasons that process is

200. See *id.* at 459 (Brennan, J., dissenting) (“To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence . . .”).

probably not worth undertaking in typical cases. When, however, the government admits illegality but offers the evidence anyway on the theory that it has incentives to take remedial steps besides suppression, the courts ought not to accept incentives when proof of concrete remedial steps can be demanded. When the tainted evidence implicates the accused in especially serious criminality, conditioning admissibility on concrete remedial steps seems more faithful to the Constitution, and to good sense, than conditioning admissibility on implausible testimony or far-fetched substantive interpretations.