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

Donald Dripps

University of San Diego, dripps@sandiego.edu

Follow this and additional works at: http://fordham.bepress.com/ulj

Recommended Citation


Available at: http://fordham.bepress.com/ulj/vol37/iss3/2
The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"

Donald A. Dripps
University of San Diego School of Law
Draft April 10, 2009

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, 1985

The exclusionary rule for evidence found in violation of the Fourth Amendment is, again, in play. In Hudson v. Michigan, 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 the Chief Justice, 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, and claiming the effectiveness of alternative remedies. The phrase "substantial social costs" appears three times in the majority opinion. Justice Breyer's stout dissent, joined by Justices Stevens, Souter, and Ginsburg, replied that exclusion would deter violations, and threw cold water on the claim of effective alternatives. One of those in the majority, Justice Kennedy, 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." He was the only justice to express this particular view.

Just this January, in Herring v. United States, the justices divided into the same blocs. This time, however, Justice Ginsburg's dissent raised the ante, by arguing that the

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 ("the 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.") (Breyer, J., dissenting).
6 Id. at 610 (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." (Breyer, J., dissenting).
7 Id. at 603 (Kennedy, J., concurring).
8 129 S.Ct. 695 (2009).
familiar cost-benefit approach to applying the exclusionary rule is misguided.\textsuperscript{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.\textsuperscript{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 \textit{Leon} decision\textsuperscript{11} being countered by appeals to 1983 law review articles and prior dissenting opinions by Justice Brennan\textsuperscript{12} It could be 1985 all over again.

This essay has two objectives. The first is to discredit both the majority and dissenting positions in \textit{Herring}. 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.\textsuperscript{13} While that cost is conceptually possible, the empirical evidence does not suggest that it is significant.\textsuperscript{14}

Notions of a right to exclude illegally obtained evidence based on unitary-transaction theories or judicial integrity are equally unsound.\textsuperscript{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 threaten the good-faith immunity defense in tort,\textsuperscript{16} with the attending 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 \textit{Herring} dissent is less than candid as well as less than logical--a red \textit{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.\textsuperscript{17} If damage actions really were a good remedy for typical violations I would stand by this idea. Assessing

\textsuperscript{9} See \textit{id.} at 707 (Ginsburg, J., dissenting).
\textsuperscript{10} \textit{Id.}
\textsuperscript{11} The \textit{Herring} majority cites United States v. Leon, 468 U.S. 897 (1984), 15 times. See \textit{id.} at 699 (twice); \textit{id.} at 700 (thrice); \textit{id.} at 701 (thrice); \textit{id.} at 703 (5 times); \textit{id.} at 704 (twice, counting the "\textit{id."}).
\textsuperscript{13} See infra Part II A-B.
\textsuperscript{14} See infra Part IIC.
\textsuperscript{15} see infra Part III.
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 was negligent, retraining the officer or instituting more intensive training programs for the wider force are plausible options. If the violation was reckless or intentional, discipline as well as retraining may be appropriate.

If the point to 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 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, as 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 dissents 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."

I. Introduction: 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*\(^{18}\) permitted a pretrial motion for the return of property to prevent the government's use of incriminating evidence against the search victim. *Weeks* made sense given the dual doctrines of *Boyd*:\(^{19}\) 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. *Silverthorne*\(^{20}\) retained the exclusionary rule despite a corporation's lack of Fifth Amendment rights, and *Agnello*\(^{21}\) blessed the suppression of contraband seized in violation of the Fourth.

Some states followed *Weeks* and some states did not. In *Wolf*\(^{22}\) 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. Twelve years later *Mapp*\(^{23}\) reversed the latter holding.


\(^{19}\) *Boyd v. United States*, 116 U.S. 616 (1886).

\(^{20}\) *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

\(^{21}\) 269 U.S. 20 (1925) (excluding cocaine discovered in warrantless search of D's home; D disclaimed possession of the cocaine).


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 (*Agnello* is illustrative). *Mapp* cited the ineffectiveness of other remedies, the need to deter misconduct, and "the imperative of judicial integrity." Only Justice Black, who supplied the fifth vote, worked from the *Boyd* doctrine to the *Mapp* result. Since *Twining* and *Adamson*, holding that the Fifth Amendment self-incrimination privilege did not apply to the states through the Fourteenth Amendment, were not yet overruled by *Malloy*, this is perhaps not surprising.

Subsequent cases made clear the salience of the deterrence rationale. *Linkletter* refused to apply *Mapp* retroactively, a result consistent with the deterrence theory. *Alderman* 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.

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. Searches were defined as tort trespasses upon private property interests, executive-branch agents could not engage in such trespassory activity without a judicial warrant, warrants by 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

---

24 Id. at 652-653 (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 Fourth-Fifth theory).
28 Twining v. New Jersey 211 U.S. 78 (1908) (Fourteenth Amendment does not create right against self-incrimination compelled by the states).
30 Malloy v. Hogan, 378 U.S. 1 (1964) (Fourteenth Amendment does create right against self-incrimination compelled by the states).
31 Linkletter v. Walker, 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).
33 See id. at 174-175 ("deterrent values of preventing the incrimination of those whose rights the police have violated " adequate remedy; further deterrence from third-party standing unjustified).
34 The obligatory citation is to Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974).
35 See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping, prohibited by state statute, no search because no trespass).
36 See, e.g., *Silverthorne Lumber*, supra note 20 (search of corporate premises without warrant violates Fourth Amendment).
property other than fruits, instrumentalities or contraband was held to violate the Fourth Amendment. 37 Exclusion, exemplified 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 felt 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 the law of search and seizure since Entick v. Carrington. 40 Terry 41 treated coercive stop-and-frisk practices, tortious prima facie, as seizures and searches that could be justified by less than probable cause, and so within the power of the police, even though, on the face of the constitutional text, beyond the power of any judge to authorize.

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 electoral sentiment, during the 1970's new justices showed more concern for law enforcement. Calandra, 42 expressive of a new Supreme Court majority more sympathetic to law enforcement than the last, embraced a purely deterrent view of the exclusionary rule. Suppression is costly and must be justified by deterrent benefits, and whenever those benefits were not clear an exception should be created. Subsequent cases took this approach repeatedly. In only one case--James 43--did the Supreme Court's balancing test incline in favor of the defense. In more

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.
38 See, e.g., Giles v. United States, 284 F. 208 (1st Cir. 1922) (ordering exclusion of liquor seized under defective warrant to be excluded from evidence and returned to defendant).
39 Katz v. United States, 389 U.S. 347 (1967) (use of microphone planted on telephone booth, owned by telephone company, a "search" of suspect when used to eavesdrop of suspect's telephone conversation).
42 United States v. Calandra, 414 U.S. 338 (1974) (holding that grand jury witness, given transactional immunity, could be compelled to answer questions based on evidence witness had previously successfully moved to suppress against himself on grounds of unlawful search).
43 James v. Illinois, 493 U.S. 307 (1990) (D's statement, obtained while he was illegally arrested, inadmissible to impeach testimony of X, a third-party defense witness).
than half a dozen others (Janis, Stone, Havens, Leon, Sheppard, Krull, and Evans) 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 was 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."

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 those with strong originalist pretensions, seems inclined to rethink it.

---

47 United States v. Leon, supra note 11 (holding that evidence found pursuant to warrant issued despite failure of application to establish probable cause will be admitted absent perjury in the supporting affidavit, partisanship by issuing judge, or patent inadequacy of application well-trained police would recognize).
48 Massachusetts v. Sheppard, 468 U.S. 981 (1984) (holding admissible evidence of homicide discovered by search authorized by modified form narcotics warrant that was not modified to particularly describe the evidence sought, which was particularly described in the officer's application).
51 See, e.g., Leon, supra note 11 at 918 (exclusion might encourage police to scrutinize applications and warrants to prevent judicial errors, but "we find such arguments speculative"); Stone, supra note 45, at 487-488 ("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 Calandra, 414 U.S. at 351-352).
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; but, although Justice Scalia noted criticisms of Katz, he did not propose returning to the trespass regime assumed by the founders.
B. The "New" Exclusionary Rule Debate: *Hudson* and *Herring*

(1) *Hudson*

The issue in *Hudson* 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*. 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. The majority noted as much.

Part IIIB of the opinion nonetheless deployed the now familiar cost-benefit balancing test. 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. Justice Scalia's discussion repeats the pro-police mantra: exclusion is a "massive remedy" that carries "substantial social costs."

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. Justice Scalia pointed to the recognition of entity liability in *Monnell*, the provision authorizing payment of attorney's fees to successful §1983 plaintiffs, and the increasing professionalization of the police.

---

54 *See id.* at 604 (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*, 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 594-599.
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.")
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 42 U.S.C. § 1983 for meaningful relief").
61 *See id.*. *Bivens* decided 10 years, and *Monell* decided 17 years, after *Mapp*.
62 *See id.* at 598 (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, p. 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, Jun. 25, 2006 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.
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 comply 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 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.

In a minority of cases exclusion costs the public a conviction the police might later have enabled 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 the hump, 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; and 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 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 1920's.\(^{67}\) If they were bad arguments we would expect exclusionary rule critics to acknowledge them and reply. Justice Scalia's silence is telling in two ways. The first is that it corroborates the familiar critique of the Court's cost-benefit approach. The second is that the very indifference to these familiar arguments reflects minds bent on a conclusion. There may be good rejoinders to the "blame the right not the remedy" and "damage actions have the same

\(^{64}\) 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.") (Traynor, C.J.).

\(^{65}\) See Dripps, Contingent, supra note 17, at 12 ("because 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.").
costs" arguments (although I have not seen compelling rejoinders in the literature). 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 establish 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. 42 U.S.C. §1988(B), authorizing attorney's fees for successful plaintiffs, passed the Congress in 1976. There is no correlative provision for Bivens actions.

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. 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. 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 or Graham v. Connor, 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 suggestive.

(2) Herring

The Court characterized the issue in Herring 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. The same justices composing the Hudson majority held

---

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 ("governments routinely defend their officers against constitutional tort claims and indemnify them for adverse judgments.
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).
74 490 U.S. 386 (1989) (holding that excessive force by police can establish Fourth Amendment violation supporting suit for damages).
75 The actual facts are less sanitary. See 129 S.Ct. at 698. Investigator Anderson was willing to phone around the state looking for a reason to give Herring a toss; by strange coincidence he receives oral notification of an outstanding warrant, actually rescinded but that "for whatever reason" was not recorded as
that the evidence 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 that compliance as either a cost of itself or not worth the loss of one 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 analysis and the extension of the Leon-Evans line of cases to records maintained by the police.78 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 say that the exclusionary rule is back, but unchanged since the nineteen-eighties. 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.

76 Id. at 702 (footnote omitted).
77 Id. at 702 n.4 (citations omitted).
78 Id. at 708 (“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.”) (Ginsburg, J., dissenting).
79 See id. at 711 (“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” majority's approach.”) (Breyer, J., dissenting). Justice Breyer's reading of the caselaw is supported in Wayne R. LaFave, The Smell of Herring, 99 J. Crim. L. & Crimin. xxx, at xxx (2009) (forthcoming) (electronic version available at ssrn.com/abstract=1347310).
80 See id. at 708 (Ginsburg, J., dissenting).
In my view both blocs are wrong. The next two parts of the article explain why.\textsuperscript{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 value of the violation to be zero.\textsuperscript{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 \textit{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 \textit{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 actors secure from violations and the cost of those violations. Such a 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 punitives 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 1.

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 a good reason to doubt that damage actions achieve optimal

\textsuperscript{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-\textit{Hudson} but pre-\textit{Herring}), now forthcoming with the other symposium papers as Donald A. Dripps, \textit{The Exclusionary Rule in the Roberts Court: Normative and Empirical Dimensions of the Overdeterrence Concept}, ___ Chi.-Kent L. Rev. ___ (2009).

\textsuperscript{82} See, e.g., Eric A. Posner & Cass R. Sunstein, \textit{Dollars and Death}, 72 U. Chi. L. Rev. 554-555 (2005): As is well known, people can be given optimal incentives to take care if they are required to pay damages for any financial losses that they cause (or negligently cause). . . .The efficient level of care is the amount at which the marginal cost of care equals the expected marginal cost of an accident. By requiring the tortfeasor to pay damages, the law forces the driver to internalize the losses that she creates, so that she will take precautions when the costs of those precautions are less than the expected losses. (footnotes omitted).
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 abolished qualified immunity (which was as unknown to the founders as the exclusionary rule), 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.

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.

Typically, however, exclusion operates in cases where damage actions face formidable valuation problems. We can perhaps estimate the employer's benefit from

---

83 See 3 William Blackstone, Commentaries *208-15. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. 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: "[T]he 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. As Judge Cooley put it, “Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another.” Cubit v. O'Dett, 16 N.W. 679, 683 (Mich. 1883). Thus in Wilkes v. Wood, 19 Howell's St. Trials 1154 (C.P. 1763), Wood had relied on the warrant issued by the Secretary of State, but was nonetheless found liable in trespass for damages of £1,000, a huge sum for the time, in a society with imprisonment for debt.

84 See John C. Jeffries, Jr., Structural Reform Revisited, 95 Cal. 1387, 1408 (2007) ("any 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.")

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 over-deterrence.

The *Hudson* majority seems to suppose that this remedial mix of damage actions, limited by qualified immunity, and the exclusionary rule, is overdeterring 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. Suppose further 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; is this overdeterrence?

The Supreme 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. Congress can make 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, 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 1000 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-

86 The obligatory citation is to 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 157, Judge Calabresi made no use of the property/liability construct, which tends to support the point in text.
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 criminally\(^{87}\) 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, in most cases, Fourth Amendment violations can be remedied only \textit{ex post}, typically by exclusion, damage actions, or both. To say that \textit{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 but rather 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 \textit{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 trans substantive 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 trans substantive issue, the issue is one of substantive rather than remedial law.

---

\(^{87}\) See Koon v. United States, 518 U.S. 81 (1996) (appeal of sentence imposed following conviction of police officers accused of the Rodney King beating which was recorded on videotape).

\(^{88}\) See, e.g., Wilson v. Aquino, 233 Fed. Appdx. 73 (2d Cir. 2007) (upholding punitive damage judgment for illegal body-cavity search).

\(^{89}\) See, e.g., Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (enjoining 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., City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Ferguson v. City of Charleston, 532 U.S. 67 (2000).

\(^{91}\) See Eugene Kontorovich, \textit{The Constitution in Two Dimensions: A Transaction Cost Analysis to Constitutional Remedies}, 91 Va. L. Rev. 1135, 1179 (2005) (distinguishing warrant-clause cases from reasonableness-clause cases, and arguing that latter cannot be litigated \textit{ex ante} so that 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 \textit{ex post}. In, for example, a police homicide case like Tennessee v. Garner, 471 U.S. 1 (1985), the only feasible remedy is \textit{ex post}. It does not follow that the amount of damages should be compensatory rather than punitive.

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 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* opinion\(^94\) 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

\(^93\) Writing in 1982, Judge Posner took the view criticized in the text:

suppose that evidence that is indispensable to convicting a criminal is seized as an incident to some illegal search. Further suppose that the illegal search imposes a cost of $100 on the person searched in terms of lost time spent cleaning up after the searching officers, but that the loss to society from not being able to convict him can be valued at $10,000. If the probability of apprehending and convicting the illegal searcher is one, a fine of $100 would provide optimal (which is not to say 100 percent) deterrence of such illegal searches. The 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). This seems wrong because the substantive constitutional provision excludes utility from prohibited practices, just as the criminal law excludes utility from contraband. Writing in 1999, Judge Posner took a different and to my mind more persuasive tack:

The point I have been emphasizing--that abrogating rules of privilege might yield only a meager evidentiary harvest--is applicable to other exclusionary rules, notably the much-criticized rule excluding evidence obtained by an illegal search or seizure. Such evidence is generally highly probative, and sometimes essential, and its exclusion has seemed a disproportionate sanction for police misconduct. Yet most of the people who make this criticism 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*, 129 S.Ct. at 700 n.2 ("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.")
Constitution as a cost. As those opinions stand, the Chief Justice appears to take comfort from the frequency with which this error has been repeated.

We need more Bentham, and less Bo-Peep, in the exclusionary rule controversy. 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, plenary 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 much more difficult the production and distribution, on an industrial scale, of cocaine, heroin, and child pornography. 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. Sweeping search and arrest powers were a necessary component of the odious Southern slave apparatus. The Second World War and the Cold War (including the shooting wars in Korea and Viet Nam) were waged with the object of preventing the global hegemony of aggressive police states. In the latter struggle the United States stood ready to use nuclear weapons against cities. In the former struggle it actually did so.

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. 96 We should not, however, sugarcoat the facts. The choice between freedom and

---

95 Ironically, the *Hudson* majority is very much on board with Crawford v. Washington, 531 U.S. 36 (2004) (Scalia, J.), 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. Rev. 747, 772-773 (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 *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 (2003) (empirical study based on FBI UCR data in pre-*Mapp*-no-exclusion and pre-*Mapp*-exclusion states finding 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 their own finding that states that adopted the exclusionary rule on their own decreased the crime rate, *id.* at 171, the authors freely speculate about self-selection. 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,
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 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. Individuals therefore do not internalize (or expect to internalize) these costs.

---

planting microphone in private bedrooms, and indefinite detention incommunicado on suspicion—all, of course, without warrants?

See Jeffries, supra note 84.

See id. at 267 ("[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.")
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 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.99

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 combination of crime-control measures R adopts. The next-best use for marginal police

---

99 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 *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 Syr. 1079 (1993). For a more recent resume of the supporting argument, see Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School,* 3 Oh. St. J. Crim. L. 125, 145-150 (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. Con. L. 797, 843-844 (2007) ("Even aside from political opportunity costs, liability-producing conduct may have political benefits that offset the deterrent effect of liability. To use Professor 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.") (footnote omitted).
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 to some extent depends 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 inevitable discovery exception requires proof by a preponderance that the tainted evidence would have been found later and lawfully but for the premature police intervention. 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.

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:

\[ \text{NEB} + (\text{EVB} \times (1 - \text{PX})) \geq (\text{QR} \times \text{NBU}) + (\text{PD} \times \text{QD}) \]

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.

101 See Dripps, Contingent, supra note 17.
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.

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%. 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 NEV and (EV * 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. 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 distribution 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

---

102 See Jeffries, Structural Reform, supra note 84, at 1407: The combined effect of exceptions to the rule and restrictions on collateral review has been to leave exclusion of illegally seized evidence primarily in the hands of state courts. [While "few object to suppression for flagrant illegality", "difficulties arise in borderline cases".] One suspects that many courts in many places strain to avoid that result. 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. (footnotes omitted).

http://fordham.bepress.com/ulj/vol37/iss3/2
police perjury reduce the probability that evidence illegally seized in fact will be ruled so in court.

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 overdeterrence (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 much resources relative to offenses that only low-probability cases are left to pursue), or underdeterrence (the police engage in lots of low-probability, and therefore 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, respectively, search warrants for private premises, warrantless vehicle searches during traffic stops based on probable cause under Ross and Acevedo, and Terry stops of citizens on the streets. The evidence is not as extensive as might be wished, 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.

(1) Warrant Searches

The Fourth Amendment requires probable cause to issue a search warrants. The Supreme Court has resisted quantifying probable cause, 103 but 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.

103 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 and depends on the totality of the circumstances. . . . The 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 that less likely than not is improbable and so no probability at all, fair or foul. 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, 149-150 (2005).
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. 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 found that search warrants executed in a Connecticut jurisdiction in two different years, 64% and 70% of the warrants resulted in the seizure of some of the target evidence. 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%. More recently, Laurence Benner and Charles Samarkos 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.

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 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.

---

104 See Donald A. Dripps, Living with Leon, 95 Yale L.J. 906, 926-927 (1986).
106 Richard van Distend 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, id. at 50, and multiplying that percentage by the percentage of warrants for which returns were in fact filed, id. at 46.
108 See William J. Stuntz, O.J. Simpson, Bill Clinton, and the Trans substantive Fourth Amendment, 114 Harv. L. Rev. 842, 848 (2005) ("requiring a warrant is a good thing if, but only if, the substantive standard
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 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, a'la Mapp, would flourish. Evidence of crimes by the

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.

23
wealthy, well-educated, and politically-connected would be just as inaccessible to justice as with the exclusionary rule.

(2) Warrantless Searches

Warrantless searches for evidence, independent of arrests, occur almost exclusively in the context of automobiles. For these searches the police need probable cause, but not a warrant. 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. 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 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. 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%. 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. 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%.

Now 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.

110 Id. at 674, Table 9.
111 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.") (footnotes omitted).
112 Id. at 700, Table 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.
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 were loath to do so.\(^\text{113}\)

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.

So 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, they suggest some degree of underdeterrence.

(3) *Terry* Stops

Under *Terry v. Ohio*\(^\text{114}\) 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[.]."\(^\text{115}\) An anonymous tip corroborated only by police observation of innocent details in the tip falls shot of this standard.\(^\text{116}\) Presence on the streets in a high-crime neighborhood, coupled with flight from the police on sight, is enough.\(^\text{117}\) 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 stop people they will have no evidentiary gains unless they see an offense *in flagrante*. From a crime-control standpoint, they have an incentive to stop and risk the

---

\(^{113}\) William R. Smith et al., The North Carolina Highway Traffic Study, Final Report to the U.S. National Institute of Justice 153 (2003) ("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 the time.").

\(^{114}\) 392 U.S. 1 (1968).


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 to dissuade 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. That controversy, however, induced several jurisdictions to require police to keep records of search-and-seizure activity, including Maryland and North Carolina as discussed above. The New York City police have been recording on-the-sidewalk Terry stops since the 1990's. A recent RAND study of half a million reported Terry stops by the NYPD found that only 10% of these stops resulted in either an arrest or a citation.118

The NYPD employs an 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, we are interested in how far an aggressive department feels free to go before the costs exceed the gains. The NYPD believes that neither the exclusionary rule nor the tort remedy eliminates the net benefits 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 underdeterrenting 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 a third, of those stopped.119 This may be a reporting artifact but that seems improbable given that in the other two-thirds of these cases the police did bother to fill out the form recording the stop itself. The hit rate for these frisks is quite low, with some contraband being recovered in

119 Id. at 37 (Table 5.2).
between 5.4% and 6.4% of frisks. The numbers vary a bit across racial groups, but across groups roughly speaking one percent of frisks recovered a weapon.

Some contraband was recovered in 6.4% of frisks of whites, 5.7% of blacks, and 5.4% of Hispanics. The recoveries were primarily of drugs: "For every 1,000 frisks of blacks 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.

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.

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 something like 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 J.L. case, 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. On the other hand, 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

---

120 41-42 (including Table 5.5).
121 Id.
122 Id. at xv.
123 Id.
weapons 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. The Florida Supreme Court agreed with the trial court that the evidence should have been suppressed, but two dissenters there urged an exception that would make a conclusory anonymous tip reasonable suspicion when the tip alleges the possession of a firearm.¹²⁶

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 overdeterring 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."¹²⁷ 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

¹²⁵ Id. at 269.
¹²⁶ Id.
the evidence 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. 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-deterring 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 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.

128 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, Table 5.0002.2004, available at http://www.albany.edu/sourcebook/pdf/t500022004.pdf. The Table lists the offenses differently; I generated my number by summing the arrests and convictions across all offenses listed.
(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 made 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 overdeter (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 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 exceptionally both 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' 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."  

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

The specific citation to *Whiteley* is to pages 568-569, where the *Whitely* 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. 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*. 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 v. United States* 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. 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. But *Boyd* is dead.

---

129 129 S.Ct. at 707.
130 *Id.* (quoting 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, 1369 (1983)).
131 Kamisar, *supra* note 12. The specific reference is to p. 600, where Kamisar describes *Weeks* as approving the view that loss of evidence is attributable to the Fourth Amendment rather than to the exclusionary rule.
132 *Id.*
134 See *Whitely* at 568-569.
135 See *Olmstead v. United States*, 277 U.S. 438, 477-479 (1928) (Brandeis, J., dissenting):
Justice Ginsburg, presumably, is not calling for the return of Boyd. On Justice Brandeis's view, Boyd calls for holding unconstitutional any--repeat, any--surreptitious electronic surveillance for law-enforcement purposes. On any view Boyd prohibits any seizure of private papers, even 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 or 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 the Silverthorne Lumber case. Silverthorne suppressed evidence obtained by 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." 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.").

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

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.

(footnotes omitted).

136 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 course of a court's procedure", id. at 477-478 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.

137 251 U.S. 385 (1920).
138 Id. at 392.
139 Id.
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."\(^{140}\)

Dropping the inapposite invocations of Whiteley and Brandeis, the second paragraph condenses to adding the authority of Holmes and Kamisar to the first paragraphs 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 dissenter 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."\(^{141}\)

Granting that if admission of the evidence necessary 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 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 clearly enough 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 very widespread belief that police not infrequently testify untruthfully at suppression hearings and that judges not infrequently credit (I do not say "believe") their testimony.\(^{142}\)

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 moral message that is being sent. Likewise, citizens who see evidence admitted based on

\(^{140}\) *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

\(^{141}\) *Herring*, 129 S.Ct. at 707 (Ginsburg, J., dissenting).

unlikely police testimony will be receiving a very different moral message than the one the *Herring* dissenters want to transmit.

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 the 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.[^143] It also has a variety of related weaknesses. First, it does not speak to illegal searches or arrests that produce no evidence (which for simplicity I will refer 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 an illegal 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.

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 his suppression motion. Has the government not done enough to cleanse its hands and dissociate itself from the unlawful search? Not done enough to express its disapproval of its agents' conduct? It has done all it could do, if D were innocent. Must it do yet 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 into me. If, however, your 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, no U.S. court appears to have departed from the common-law rule that illegality in the search or the seizure did not bar proof at a criminal trial. Indeed, it was thought a point against exclusion that this would require going into a "collateral issue!" 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 twentieth-century 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

---

144 This is the example given by Duff et al., supra note 143, 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." 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."

145 See, e.g., Commonwealth v. Dana, 43 Mass. 329, 337 (Ma. 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.

146 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.")
court grants judgment for the defendants, 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 consequences, they also point toward awarding A damages, regardless of consequences.

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

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 without a warrant enter and search the apartment of A and B. Suppose the police, without a warrant, enter the apartment of A and B, and 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.

Given that we do not return contraband, or increase damages for illegal searches, 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 case if the court received the evidence. As in the classic third-party standing cases like Boren or

---

147 See Posner, supra note 93, 57 Wash. L. Rev. at 640-641: [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 underdeterring 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. Monnell v. New York City Dept. of Social Services, 436 U.S. 658 (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.

148 If are living in the eighties, 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 telltale 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, Living with Leon, supra note 104, at 920-921.
Dripps: The "New" Exclusionary Rule

Barrows, assertion of the claim by the right-holder is impracticable. The tort action has atrophied, and there is no sentiment on 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 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, and Professor Alschuler noted in analyzing the causation issue in Hudson, 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. 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. Professor Amsterdam's proposal to exclude drugs found during

---


150 See Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 437 (1974) ("Upon 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.").

151 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 right of others.").

152 See Amsterdam, supra note 34, at 434-439 (suggesting that the exclusion of drugs found during lawful frisks for weapons to discourage pretextual frisks, some legal and others not, made for the subjective purpose of finding drugs).

153 See People v. Martin, 290 P.2d 855, 857 (Ca. 1955) (Traynor, J.): In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory ["that the evidence is excluded to provide a remedy for a wrong done to the defendant"], and based its decision on the ground that ‘other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.’ This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them. . . .
legal frisks for weapons under *Terry* is doctrinally more radical but likewise a logical disincentive to illegal stops and frisks.\textsuperscript{154}

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 to the good. The government would then train the force to avoid any but the most clearly legal searches.

Consider another hypothetical case, this one based on *Walder v. United States*.\textsuperscript{155} 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 arrested after buying illegal drugs from an undercover agent. D claims entrapment. The government offers to prove predisposition by introducing proof of the seizure the year before.

In this case, the government already has lost one case against the defendant. Nor has the defendant 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*.\textsuperscript{156} 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 the tainted evidence might have made. Going further with exclusion would not have restored the privacy lost during the illegal search, and it would not have discouraged subsequent violations.

We have the exclusionary 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 only by making them toothless (the immunity defense to tort suits is illustrative).

---

\textsuperscript{154} See Amsterdam, *supra* note 34.
\textsuperscript{155} 347 U.S. 62 (1954).
\textsuperscript{156} United States v. Calandra, *supra* note 42.
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 underdeterring. 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 \textit{Terry v. Ohio}. This reinforces criticisms of the exclusionary rule made by those to the left of the \textit{Hudson} and \textit{Herring} majorities, such as Judge Calabresi\footnote{Guido Calabresi, \textit{The Exclusionary Rule}, 26 Harv. J. L. & Legis. 111 (2003).} and Professor Slobogin.\footnote{See Christopher Slobogin, \textit{Why Liberals Should Chuck the Exclusionary Rule}, 1999 Ill. L. Rev. 363.} Despite hostility to the exclusionary rule, and any number of proposals for reform, legislatures have not acted to provide alternative remedies.\footnote{See, e.g., Donald A. Dripps, \textit{Akhil Amar on Criminal Procedure and Constitutional Law: "Here I go Down that Wrong Road Again"}, 74 N. Car. L. Rev. 1559, 1616-1617 (1996) (noting proposals by Caleb Foote, Richard Posner, and Warren Burger); Louis Michael Seidman, \textit{The (Premature?) Demise of Criminal Procedure Liberalism}, 107 Yale L.J. 2281, 2303 (1998) (reviewing Akhil Reed Amar, \textit{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.") \textit{Cf.} note 99, \textit{supra} (analyzing legislative incentives).} Despite this, the government has chosen to continue using the exclusionary rule.

In a prior article I argued for giving judges the option of suppressing evidence contingent on the failure to pay damages.\footnote{See Dripps, \textit{Contingent, supra} note 17.} 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 \textit{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? On this scenario,
the threat of 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, as well as providing 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.\(^{161}\) 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.\(^{162}\)

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 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.\(^{163}\)

A. Virtual Deterrence: The Basic Idea

\(^{161}\) 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) ("key 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.") (footnote omitted).

\(^{162}\) See Orfield, supra note 142, at 1047-1049 (Chicago narcotics officers expressed the belief that both
superiors and peers noted involvement of individual officers in suppression rulings; involvement in
frequent suppression rulings could result in reassignment and bad faith violations might lead to dismissal in
extreme cases).

\(^{163}\) See infra Part IIC.
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 (perhaps even better) than the exclusionary rule, but also cashing in 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 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 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, 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.164 Accordingly, it does not bar plaintiffs from proving remedial measures undertaken before the accident giving rise to the instant suit.165 Like Rule 407, virtual deterrence welcomes relevant evidence as soon

---

164 See, e.g., Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463 (7th Cir. 1984) (holding that anti-deterrent policy of rule 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.

165 See Advisory Committee Notes, FRE 407, 1997 Amendments: 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.
as the remedial measures 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 a 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.

As things stand 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 of the evidence as a cost distinct from the costs of the Fourth Amendment. 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, leaving his neighborhood, 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 tv.

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 liable to criminal prosecution for purposes of general deterrence and possible reformative 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.

---

166 *See infra* Part IIA.
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 his 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 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. The labor-law 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. 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.

167 Often there is a collective bargaining agreement between the employer and the officers, with a provision for arbitration. See, e.g., Whittie v. Doyle, 228 Fed. Appx. 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 tenured employees a hearing before termination. See, e.g., Urban v. Tularosa, 161 F.3d 19 (table) at *4 (10th Cir. 1998) (police officers "with a property interest in continued employment" entitled to pre-termination notice and 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 Fed. Appx. 679 (9th Cir. 2002).

In a homicide case like *Sheppard*\(^{169}\) or a major drug case like *Bayless*,\(^{170}\) 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 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 *Payner*, the agents deliberately violated the victim's rights with the purpose of exploiting the standing doctrine to incriminate the target.\(^{171}\) But why speculate about adequate deterrence, as opposed to enquiring 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

\(^{169}\) Massachusetts v. Sheppard, 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 particularly described in the officer's affidavit).


\(^{171}\) United States v. Payner, 447 U.S. 727 (1980) (holding admissible against D papers stolen from X, D's accountant, by surreptitious warrantless entry of X's hotel room). The actual facts are even more unsavory than the pallid parenthetical suggests.
the risk of lost evidence. 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 police power. 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 be true, the conclusion seems impious. At the least, before admitting the evidence, the court hearing the suppression motion ought to enquire 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 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." Deterrence does not suffer because "The 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." If inevitable discovery were factually transparent the doctrine might make 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.176

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 very probably 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 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.

176 See id. at 459 (Brennan, J., dissenting):
The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. 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 before concluding that the government had met its burden of proof on this issue.