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## CULPABILITY, DETERRENCE, AND THE EXCLUSIONARY RULE

Kit Kinports\*

### ABSTRACT

This Article discusses the Supreme Court's use of the concepts of culpability and deterrence in its Fourth Amendment jurisprudence, in particular, in the opinions applying the good-faith exception to the exclusionary rule. The contemporary Court sees deterrence as the exclusionary rule's sole function, and the Article begins by taking the Court at its word, evaluating its exclusionary rule case law on its own terms. Drawing on three different theories of deterrence—economic rational choice theory, organizational theory, and the expressive account of punishment—the Article analyzes the mechanics by which the exclusionary rule deters unconstitutional searches and questions the Court's recent decision to incorporate the culpability of the police officer into the deterrence calculus. Given the empirically speculative nature of the deterrence inquiry, the Article then pushes back on the Court's one-dimensional emphasis on deterrence, comparing other areas where law has a deterrent aim and finding that they—like the Court's earlier version of the exclusionary rule—are designed to serve other interests as well. The Article concludes that balancing other non-deterrence goals in determining the reach of the exclusionary rule would eliminate the need to focus exclusively on the intractable questions surrounding deterrence and thereby help inform the structuring of the remedy.

### INTRODUCTION

By this point, the regrettable state of the Supreme Court's Fourth Amendment jurisprudence comes as no surprise to anyone. Academics and jurists of all stripes agree that the Court's case law in this area is a mess.<sup>1</sup> In part, this state of affairs reflects the

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<sup>1</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757, 759 (1994) (calling the Court's case law "an embarrassment" and a "doctrinal mess"); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) ("The fourth amendment cases are a mess!"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 375 (comparing the exclusionary rule to "swiss cheese"); 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, 1366 (1983) (describing the

Court's failure to agree on a doctrinal framework for the Fourth Amendment's exclusionary rule. Although it is well accepted that the Court now treats the exclusionary remedy as exclusively deterrence-driven,<sup>2</sup> the Court has not articulated a coherent theory explaining how it expects exclusion to deter unconstitutional searches and why it considers deterrence a worthy goal. Further complicating the analysis, the Court has recently injected the concept of police culpability into the deterrence calculus.<sup>3</sup>

Nowhere is this lack of analytical rigor more striking than in the so-called "good faith" cases. The good-faith exception to the exclusionary rule, initially recognized in *United States v. Leon*,<sup>4</sup> has now been part of the Fourth Amendment legal landscape for almost thirty years. Scholars and dissenting Justices have offered trenchant, at times withering, critiques of *Leon* and its early progeny,<sup>5</sup> and now of the Court's three recent forays into this area—*Hudson v. Michigan*,<sup>6</sup> *Herring v. United States*,<sup>7</sup> and *Davis v.*

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exclusionary rule as "a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along").

<sup>2</sup> See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."); *United States v. Leon*, 468 U.S. 897, 916 (1984) ("[T]he exclusionary rule is designed to deter police misconduct . . ."); *United States v. Calandra*, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . ."); *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). For a discussion of other purposes that have previously animated the Court's exclusionary rule jurisprudence, see *infra* notes 183–89 and accompanying text.

<sup>3</sup> See *Davis*, 131 S. Ct. at 2428–29; *Herring v. United States*, 129 S. Ct. 695, 701–04 (2009).

<sup>4</sup> 468 U.S. 897 (1984).

<sup>5</sup> For critiques of *Leon* and the good-faith exception, see, for example, Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986); Wayne R. LaFave, "The Seductive Call of Expediency": *United States v. Leon*, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895; William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981). *But cf.* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1329–34 (2000) (defending the good-faith exception as consistent with her characterization of the exclusionary rule as a sanction rather than a price).

<sup>6</sup> 547 U.S. 586 (2006) (refusing to apply the exclusionary rule to violations of the knock-and-announce requirement). For critical commentary, see, for example, Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741 (2008); Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. DAVIS L. REV. 1035 (2008); Donald Dripps, *The Fourth Amendment, The Exclusionary Rule, and The Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.–KENT L. REV. 209 (2010); David A. Moran, *Waiting for the Other Shoe: Hudson and the Precarious State of Mapp*, 93 IOWA L. REV. 1725 (2008); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

<sup>7</sup> 129 S. Ct. 695, 702 (2009) (suggesting that the exclusionary rule is inapplicable in cases of "nonrecurring and attenuated negligence"). For critical commentary, see, for example,

*United States*.<sup>8</sup> And others have more generally despaired completely of the exclusionary rule's efficacy as a deterrent,<sup>9</sup> at times advocating alternative remedies for Fourth Amendment violations.<sup>10</sup>

Stepping back from the well-deserved criticism leveled at the Court's rulings in these individual cases, and while questions surrounding the wisdom—and, perhaps more important, the political feasibility—of alternative proposals remain unresolved,<sup>11</sup>

Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); David H. Kaye, *Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—and Back?*, 58 UCLA L. REV. DISC. 207 (2011) <http://www.uclalawreview.org/pdf/discourse/58-11.pdf>; Wayne R. LaFare, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

<sup>8</sup> 131 S. Ct. 2419, 2428 (2011) (applying the good-faith exception where police conducted a warrantless vehicle search incident to arrest “in strict compliance with then-binding Circuit law”). For critical commentary, see, for example, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012).

<sup>9</sup> See, e.g., Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 588, 591 (2011) (citing the law and economics concepts of “selection biases, information asymmetries, misaligned incentive structures, and substitution effects” in finding that the exclusionary rule does not deter “under typical conditions”); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 755 (1998) (surveying empirical studies and concluding that the exclusionary rule “is simply inadequate as a deterrent”); Slobogin, *supra* note 1, at 365 (arguing that the exclusionary rule is “significantly flawed as a deterrent device”).

<sup>10</sup> See, e.g., Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1613 (2012) (relying on the exclusionary rule's deterrent failures to defend a return to the warrant requirement on the grounds that when “ex post remedies fail, the law turns to ex ante alternatives”); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 115–17 (2003) (suggesting that constitutional violations lead to sentencing reductions coupled with “automatic police punishment” tied to the level of police culpability); David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 165–86 (2009) (advocating steps to increase police accountability, including early intervention systems, data collection, internal discipline, citizen complaints, and improved constitutional tort remedies); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970) (defending “an effective tort remedy” in place of the exclusionary rule); Perrin et al., *supra* note 9, at 743–54 (supporting a civil administrative remedy unless the violation was intentional or willful); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (preferring a tort remedy because damages can be set “to yield the optimum level of deterrence”); Slobogin, *supra* note 1, at 405–06 (proposing an administrative remedy that would award liquidated damages payable by the police department for good-faith violations and otherwise by the individual officer).

<sup>11</sup> Although an evaluation of potential alternatives to the exclusionary rule is beyond the scope of this Article, some commentators who have engaged in such an analysis have concluded that the exclusionary remedy, though “flawed,” is “the best we can realistically do.” Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847–48 (1994); see also William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional*

this Article takes the Supreme Court at its word that it cares about deterring Fourth Amendment violations and evaluates the Court's opinions on its own terms. After introducing the good-faith cases in Part I, Part II explores three different models of deterrence that the Article uses in assessing the deterrence analysis found in the Court's decisions: economic rational choice theory, organizational theory, and the expressive account of punishment. Part III then draws on these different theories in evaluating the Court's narrative on the mechanics of deterrence—i.e., how the Court expects the exclusionary rule to deter police misconduct. This Part argues that the deterrence arguments the Court has advanced in this line of cases are internally inconsistent, and that considering a police officer's culpability in exempting negligent Fourth Amendment violations from the reach of the exclusionary rule is not clearly called for by any of the three theories of deterrence. Ultimately finding the questions surrounding deterrence empirically unanswerable, Part IV then pushes back on the Court's deterrence-driven focus and analyzes why the Court believes deterrence is a worthy goal for the exclusionary remedy. Here the Article looks to other areas where law has a deterrent aim and finds that they, like earlier incarnations of the exclusionary rule, also serve underlying policies that are not deterrence-based. The Article concludes that factoring in these additional policy objectives in the exclusionary rule cases would help inform the fashioning of the remedy by alleviating the need to rely exclusively on the speculative concept of deterrence.

## I. THE CASES

### *A. The Exception for Reasonable Reliance on Third Parties*

The Court created the good-faith exception in its 1984 ruling in *United States v. Leon*, refusing to apply the exclusionary rule where police reasonably rely on a warrant that turns out to be unsupported by probable cause and therefore constitutionally defective.<sup>12</sup> Explaining that the exclusionary rule is not “a personal constitutional right of the party aggrieved,” the Court instead described it as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”<sup>13</sup> The Court separately considered the exclusionary rule's potential to influence two different audiences: the judges who improperly issue warrants, and the police officers who seek and execute them. With respect to the former group, the Court

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*Remedy*, 88 GEO. L.J. 799, 871 (2000) (observing that “[t]he very factor that makes a proposed safeguard a ‘more efficacious sanction’ than exclusion will also make it unattractive to policy makers as they look for ways to avoid exclusion’s social costs”); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 444 (1997) (describing the exclusionary rule as, “by a wide margin, the best legal tool available for regulating the police”).

<sup>12</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>13</sup> *Id.* at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)) (internal quotation marks omitted).

advanced three rationales to explain why suppression was not necessary to incentivize judges to exercise greater care in making probable cause determinations. First, the Court made clear, the exclusionary remedy is “designed to deter police misconduct rather than to punish the errors of judges and magistrates.”<sup>14</sup> Second, the Court was not convinced that judges “are inclined to ignore or subvert the Fourth Amendment.”<sup>15</sup> Finally, and “most important” according to the Court, exclusion would not have “a significant deterrent effect” on magistrates because they are not “adjuncts to the law enforcement team,” but rather “neutral judicial officers” who have “no stake in the outcome of particular criminal prosecutions.”<sup>16</sup>

Turning to the exclusionary rule’s deterrent impact on the police, the Court explained that the exclusionary rule cannot deter “objectively reasonable law enforcement activity.”<sup>17</sup> More specifically, the Court reasoned that a police officer who obtains a warrant “cannot be expected to question the magistrate’s probable-cause determination” and therefore “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”<sup>18</sup> Relying on a cost-benefit balancing test that had its roots in *United States v. Calandra*<sup>19</sup> but came into its own thanks to *Leon*, the Court concluded that “the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”<sup>20</sup>

The Court would later go on to extend the good-faith exception to three other situations it found analogous to *Leon*: where police reasonably relied not on a warrant, but on a legislative enactment, a court clerk’s records, or an appellate court ruling. On each occasion, the Court repeated *Leon*’s admonition that the exclusionary rule’s deterrent focus is on law enforcement and not other state actors, and also cited the cost-benefit test in finding insufficient justification for suppressing the illegally seized evidence in order to deter the police.<sup>21</sup> First, in *Illinois v. Krull*,<sup>22</sup> the Court ruled that the good-faith

<sup>14</sup> *Id.* at 916.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 916–17.

<sup>17</sup> *Id.* at 919.

<sup>18</sup> *Id.* at 921.

<sup>19</sup> 414 U.S. 338, 349 (1974) (relying on a cost-benefit analysis in refusing to extend the exclusionary rule to grand jury proceedings).

<sup>20</sup> *Leon*, 468 U.S. at 922.

<sup>21</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2428–29 (2011); *Arizona v. Evans*, 514 U.S. 1, 14–16 (1995); *Illinois v. Krull*, 480 U.S. 340, 349–53 (1987). As discussed below, the Court in *Davis v. United States* focused more on the lack of law enforcement culpability. See *infra* notes 63–67 and accompanying text. The *Davis* Court did not specifically recite *Leon*’s observations that judges do not routinely flout the Fourth Amendment and are disinterested decisionmakers with no stake in the outcome, but it did observe that “punish[ing] the errors of judges’ is not the office of the exclusionary rule.” *Davis*, 131 S. Ct. at 2428 (quoting *Leon*, 468 U.S. at 916).

<sup>22</sup> 480 U.S. 340 (1987).

exception protected police who acted in “objectively reasonable reliance on a statute” authorizing warrantless searches that was later struck down as unconstitutional.<sup>23</sup> The Court observed that a law enforcement official “cannot be expected to question the judgment of the legislature that passed the law,”<sup>24</sup> explaining that excluding the proceeds of the unconstitutional search would have “as little deterrent effect” there as in *Leon*.<sup>25</sup> In *Arizona v. Evans*,<sup>26</sup> the Court next applied the good-faith exception where police, “acting objectively reasonably,” relied on erroneous information in the computer database of a court clerk’s office which failed to indicate that an outstanding arrest warrant had been quashed.<sup>27</sup> Then, most recently, the Court concluded in *Davis v. United States* that the good-faith exception was available where police acted in “objectively reasonable reliance on binding appellate precedent” that was “later overruled.”<sup>28</sup> Exclusion in those circumstances “deters no police misconduct”<sup>29</sup> and therefore “suppression would do nothing to deter” the police, the Court reasoned.<sup>30</sup> And, drawing from its earlier rulings in this line of cases, the *Davis* Court refused to “[p]enaliz[e] the officer for the [appellate judges’] error.”<sup>31</sup>

The Court’s recognition of a good-faith exception to the exclusionary rule has not come without controversy.<sup>32</sup> As reflected in debates surrounding the imposition of strict liability in tort<sup>33</sup> and criminal law,<sup>34</sup> the suppression of illegally obtained evidence in cases where an officer acted reasonably can create an incentive for that individual, or law enforcement generally, to use caution and err on the side of safeguarding Fourth Amendment rights.<sup>35</sup> Even the *Leon* majority acknowledged that applying the

<sup>23</sup> *Id.* at 349.

<sup>24</sup> *Id.* at 350.

<sup>25</sup> *Id.* at 349.

<sup>26</sup> 514 U.S. 1 (1995).

<sup>27</sup> *Id.* at 16.

<sup>28</sup> *Davis v. United States*, 131 S. Ct. 2419, 2423–24 (2011).

<sup>29</sup> *Id.* at 2434.

<sup>30</sup> *Id.* at 2423.

<sup>31</sup> *Id.* at 2429 (quoting *Krull*, 480 U.S. at 350) (internal quotation marks omitted).

<sup>32</sup> See *supra* note 5 and accompanying text.

<sup>33</sup> See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 534–38 (5th ed. 1984).

<sup>34</sup> Compare *United States v. Balint*, 258 U.S. 250, 251–53 (1922) (describing the deterrence justification for strict liability crimes), and Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1222 (1985) (“In effect we introduce a degree of strict liability into criminal law as into tort law when a change in activity level is an efficient method of avoiding a social cost.”), with Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 422, 423 (1958) (taking the position that an actor who is not even negligent is “nondeterrable” and calling the theory that strict liability will encourage greater care “wholly unproved and prima facie improbable”).

<sup>35</sup> See, e.g., Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307, 343 (1982) (arguing that suppressing evidence even in the face of good-faith mistakes “encourage[s] the taking of such additional

exclusionary rule where police acted in objective good faith “might” have such a deterrent effect, but ultimately found that possibility “speculative,” concluding with a dash of ipse dixit that the “marginal or nonexistent” deterrence that would be realized was outweighed by “the substantial costs of exclusion.”<sup>36</sup>

Moreover, even if *Leon* correctly declined to suppress evidence where police went to the trouble to obtain a warrant, the decision to extend the good-faith exception to

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steps as will enhance police understanding of [constitutional] limits”); Posner, *supra* note 10, at 68 (pointing out that a good-faith exception “swing[s] the pendulum of the exclusionary rule from overdeterrence to underdeterrence by removing the incentive of law-enforcement agencies to take measures to minimize good-faith violations”); cf. David C. Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. (forthcoming 2013) (manuscript at 43), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2034385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034385) (“[A]lthough it may be true that the threat of exclusion could not have deterred the officers in *Leon*, there is no reason to believe that the actual infliction of exclusion against them would not secure a higher measure of conformity to the Fourth Amendment by both them and all other officers . . .”).

<sup>36</sup> United States v. *Leon*, 468 U.S. at 918, 922. Reasoning that an unconstitutional search is, by the very terms of the Fourth Amendment, “unreasonable” and a “reasonable unreasonable search” is therefore an oxymoron, some academics have argued that there is no such beast as an objectively reasonable Fourth Amendment violation and that the good-faith exception thus improperly gives the prosecution two bites at the same apple. See, e.g., Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 231 (2010) (equating “negligence” with Fourth Amendment “unreasonableness”); Gray, *supra* note 35, at 43 (referring to this as “a non sequitur”); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 303 (1998) (calling it “pedantic” to differentiate between “objectively reasonable unreasonable searches and objectively unreasonable searches”); Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 576 (2006) (charging that the Court “created a ramshackle doctrinal structure”). Admittedly, Justice Stevens’s dissent in *Leon* persuasively argued that, given the specific definition of probable cause as “a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that . . . evidence of a crime will be found in a particular place,” *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the *Leon* majority “creat[ed] a double standard of reasonableness” by recognizing the possibility that a police officer could ever make a reasonable mistake that this standard had been met. *Leon*, 468 U.S. at 976 (Stevens, J., dissenting); see *id.* at 975 (explaining that “when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime”); see also *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (instructing that the relevant inquiry in weighing probable cause is whether the “historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause”). But the same cannot be said of other Fourth Amendment violations, for the term “unreasonable” in the Fourth Amendment is a legal construct and not one tied to the objective reasonable person standard like that created in *Leon*. In *Arizona v. Evans*, 514 U.S. 1 (1995), for example, the arrest was unconstitutional—and thus “unreasonable”—because the arrest warrant had been quashed, but it is not a contradiction in terms to say the officer reasonably believed in the existence of the warrant.



warrantless searches is open to criticism. As Justice O'Connor pointed out in her dissent in *Krull*, legislators, unlike judges, are not neutral decisionmakers but instead are political beings whose very purpose in enacting statutes authorizing warrantless searches is "explicitly to facilitate law enforcement."<sup>37</sup> And, in fact, the history underlying the Fourth Amendment indicates that "legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate."<sup>38</sup> *Evans* is subject to challenge on the grounds that "accurate recordkeeping in law enforcement" is of "paramount importance,"<sup>39</sup> and out-of-date arrest records are like "a ticking time bomb" because, given the ease with which they are shared, they can lead to multiple arrests "into the indefinite future."<sup>40</sup> Finally, *Davis* is arguably inconsistent with the Supreme Court's retroactivity doctrine, and, unlike the three earlier cases, it extends the good-faith exception to circumstances where police may not consciously be acting in *reliance* on third parties, even though they are acting in *compliance* with them.<sup>41</sup> Moreover, *Davis* discourages criminal defendants—but not prosecutors—from challenging established search and seizure rules, thus "introduc[ing] a systemic bias into Fourth Amendment litigation" and undermining the exclusionary rule's role in developing the constitutional principles governing criminal procedure.<sup>42</sup>

Nevertheless, the Court had a principled basis for refusing to exclude the evidence uncovered in these four cases. In each one, the police had acted in objective good faith, supported by a third party independent of law enforcement, and the Court feared that suppression would transform the exclusionary rule into "a strict-liability regime."<sup>43</sup> Had the Court stopped there, it would have been on relatively stable ground.

But the Court did not stop there. As discussed below, the Court has applied the *Leon* analysis in creating an exception to the exclusionary rule even in cases of intentional Fourth Amendment violations and then most recently in suggesting that police culpability greater than negligence is required to trigger exclusion.

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<sup>37</sup> *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting); see also *id.* at 365–66 ("Legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers."); Alschuler, *supra* note 7, at 468 n.21 (reporting that the attorney who represented the state in *Krull* admitted that his argument that legislators are not likely to pass unconstitutional statutes was made "tongue in cheek").

<sup>38</sup> *Krull*, 480 U.S. at 364 (O'Connor, J., dissenting).

<sup>39</sup> *Herring v. United States*, 129 S. Ct. 695, 708 (2009) (Ginsburg, J., dissenting).

<sup>40</sup> *LaFave*, *supra* note 7, at 780–81 (quoting *United States v. Mackey*, 387 F. Supp. 1121, 1124 (D. Nev. 1975)); see also *Evans*, 514 U.S. at 21 (Stevens, J., dissenting) (maintaining that police departments may be "in the best position to monitor" court computer databases and "influence mundane communication procedures in order to prevent . . . errors").

<sup>41</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2437–38 (2011) (Breyer, J., dissenting); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(h), at 21–22 (4th ed. Supp. 2011); Kerr, *supra* note 8, at 1103–06.

<sup>42</sup> Kerr, *supra* note 8, at 1082.

<sup>43</sup> *Davis*, 131 S. Ct. at 2428–29.

*B. The Exception for Even Bad-Faith Violations*

In its 2006 opinion in *Hudson v. Michigan*, the Supreme Court relied on *Leon*'s cost-benefit analysis in deciding that the exclusionary rule would no longer apply to violations of the Fourth Amendment's venerable<sup>44</sup> knock-and-announce requirement.<sup>45</sup> In a completely gratuitous part of the opinion,<sup>46</sup> the majority quoted from *Leon* in concluding that the "considerable" costs associated with "[r]esort to the massive remedy" of exclusion exceeded the deterrent benefits in knock-and-announce cases.<sup>47</sup>

Unlike the decisions discussed in the previous section, however, the *Hudson* Court could not rely on *Leon*'s principal argument that objectively reasonable police behavior is not susceptible to deterrence because *Hudson* created a blanket exception to the exclusionary rule, irrespective of the police officer's culpability. After *Hudson*, even bad-faith violations of the knock-and-announce rule do not trigger exclusion.<sup>48</sup> Rather, the Court reasoned that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act" and here "[m]assive deterrence is hardly required" because a violation of the knock-and-announce rule (unlike the warrant requirement) is unlikely to lead to the discovery of additional evidence.<sup>49</sup>

Furthermore, the Court refused to "assume" that the exclusionary rule acts as a significant deterrent "simply because we found that it was necessary deterrence in different contexts and long ago."<sup>50</sup> Reluctant to "forc[e] the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago" when *Mapp* was decided,<sup>51</sup> the Court maintained that victims of knock-and-announce violations can now find "meaningful relief" in constitutional tort litigation and that "the increasing professionalism of police forces" discourages Fourth Amendment violations.<sup>52</sup>

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<sup>44</sup> See David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 296 & n.62 (accusing the Court of "effectively killing an 800-year-old rule" that "actually may date to the era of the Magna Carta").

<sup>45</sup> See *Hudson v. Michigan*, 547 U.S. 586, 594–96 (2006).

<sup>46</sup> The Court independently justified its ruling on the grounds that knock-and-announce violations are "not a but-for cause of obtaining" evidence, and, using a novel concept of "[a]ttenuation," that "the exclusionary rule is inapplicable" because "[t]he interests protected by the knock-and-announce requirement . . . have nothing to do with the seizure of the evidence." *Id.* at 592–94 (emphasis omitted). For additional discussion of the Court's attenuation analysis, see *infra* notes 202–04 and accompanying text.

<sup>47</sup> *Hudson*, 547 U.S. at 599.

<sup>48</sup> See Alschuler, *supra* note 6, at 1775 (describing *Hudson* as creating "a subjectively unreasonable bad faith exception to the [exclusionary] rule").

<sup>49</sup> *Hudson*, 547 U.S. at 596.

<sup>50</sup> *Id.* at 597.

<sup>51</sup> *Id.* (discussing *Mapp v. Ohio*, 367 U.S. 643 (1961), which incorporated the exclusionary rule and made it binding on the states).

<sup>52</sup> *Id.* at 597, 598. Others have convincingly responded to the Court's disingenuous arguments about the viability of alternatives to exclusion, including several authors who objected that the *Hudson* majority cited their work out of context. See MICHAEL AVERY ET AL., POLICE

### C. The Exception for Negligent Violations

Three years later, in *Herring v. United States*, the Court entertained a more *Leon*-like case, in fact, one that raised a question explicitly left open in *Arizona v. Evans*—whether the good-faith exception applies where “police personnel” rather than court employees are at fault for failing to update a computer database to indicate that an outstanding arrest warrant has been quashed.<sup>53</sup> In *Herring*, the mistake in question originated from the sheriff’s office in a neighboring county, enabling the Court to observe that the officer who actually arrested Herring “did nothing improper.”<sup>54</sup> But rather than extend *Leon* to cases where police reasonably rely on officers from another jurisdiction (perhaps because doing so would run afoul of the Court’s treatment of law enforcement as a single entity),<sup>55</sup> the Court broadly pronounced that the exclusionary rule would not apply to “[a]n error that arises from nonrecurring and attenuated negligence.”<sup>56</sup>

“To trigger the exclusionary rule,” the Court explained, “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.”<sup>57</sup> This dual focus on “the culpability of the police and the potential of exclusion to deter wrongful police conduct” led the Court to conclude that the exclusionary remedy “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>58</sup>

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MISCONDUCT v n.1 (3d ed. 2009) (describing as “highly misleading” *Hudson*’s citation of their book in the discussion of constitutional tort remedies); Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5 (accusing the Court of “twist[ing]” his argument that the exclusionary rule “played a pivotal role in stimulating [police department] reforms” and concluding that *Hudson* “marks a dangerous step backward in removing a crucial component of [the remedial] mix”).

<sup>53</sup> *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (quoting *Arizona v. Evans*, 514 U.S. 1, 16 n.5 (1995)) (internal quotation marks omitted).

<sup>54</sup> *Id.* at 700.

<sup>55</sup> *See id.* at 699–700 (admitting that “[i]n analyzing the applicability of the [exclusionary] rule, *Leon* admonished that we must consider the actions of all the police officers involved”); LaFave, *supra* note 7, at 772–75. *But cf.* Jennifer E. Laurin, Essay, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 685 (2011) (arguing that *Herring* “pars[ed] . . . relative fault among various law enforcement actors, in lieu of considering law enforcement conduct as a collective whole”).

<sup>56</sup> *Herring*, 129 S. Ct. at 702. The *Herring* Court did not define the concept of “attenuation,” and commentators have taken conflicting positions on its meaning and the extent to which it restricts the reach of the Court’s holding. *See* Alschuler, *supra* note 7, at 478–81; Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 5–6 (2012); LaFave, *supra* note 7, at 770–83. In its subsequent decision in *Davis*, however, the Court’s description of *Herring* failed to even mention the term, making it less likely that attenuation will serve as a meaningful limit on *Herring*’s exemption for negligent violations. *See Davis v. United States*, 131 S. Ct. 2419, 2426–29 (2011).

<sup>57</sup> *Herring*, 129 S. Ct. at 702.

<sup>58</sup> *Id.* at 698, 702.

In response to the four dissenters' argument that the majority's decision contradicted "a foundational premise of tort law,"<sup>59</sup> the Chief Justice dropped a footnote explaining that the majority did "not quarrel with [the] claim that 'liability for negligence . . . creates an incentive to act with greater care'" and did not mean to "suggest that the exclusion of this evidence could have *no* deterrent effect."<sup>60</sup> Nevertheless, the Court continued, with another dose of ipse dixit, "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."<sup>61</sup> In cases like *Herring*, the Court concluded, "when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"<sup>62</sup>

Predictions that *Herring* would be read narrowly were proven wrong by the Court's 2011 ruling in *Davis v. United States*. Unlike *Herring*, *Davis* fell more squarely within *Leon*'s ambit because, as discussed above, the police officers there were relying not on other law enforcement officials but on judicial precedent allowing warrantless automobile searches.<sup>63</sup> But instead of merely reiterating the common rationale underlying *Leon*, *Krull*, and *Evans*, the *Davis* majority gave a "ringing endorsement" to the notion of culpability introduced in *Herring*.<sup>64</sup> Interspersing quotations from *Herring* and *Leon*, the *Davis* Court said:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "deterrence rationale loses much of its force," and exclusion cannot "pay its way."<sup>65</sup>

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<sup>59</sup> *Id.* at 708 (Ginsburg, J., dissenting).

<sup>60</sup> *Id.* at 702 n.4 (majority opinion) (quoting *id.* at 708 (Ginsburg, J., dissenting)).

<sup>61</sup> *Id.* at 702–03 n.4 (quoting *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987)).

<sup>62</sup> *Id.* at 704 (quoting *United States v. Leon*, 468 U.S. 897, 908 n.6 (1984)). Although the *Herring* opinion quoted extensively from *Leon*, it is not a good-faith case because the officers who maintained the computer database were concededly negligent and did not act in an objectively reasonable manner. Nevertheless, some commentators—as well as the Court itself—have mistakenly aligned *Herring* with the good-faith rulings. See *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011) (implying that *Herring* is the "[m]ost recent[ ]" application of *Leon*); Kerr, *supra* note 8, at 1105.

<sup>63</sup> See *Davis*, 131 S. Ct. at 2425–26.

<sup>64</sup> Maclin & Rader, *supra* note 8, at 1189.

<sup>65</sup> *Davis*, 131 S. Ct. at 2427–28 (quoting *Herring*, 129 S. Ct. at 701, 702; *Leon*, 468 U.S. at 909; *Herring*, 129 S. Ct. at 698; *Leon*, 468 U.S. at 908 n.6, 919) (internal quotation marks

Resurrecting *Herring*'s distinction between negligent and more culpable police misconduct was entirely unnecessary, of course, because—just as in *Leon*, *Krull*, and *Evans* (but not *Herring*)—the officers in *Davis* were not even negligent.<sup>66</sup> The Court need have gone no further than to recite *Leon*'s tripartite justification for analyzing only the exclusionary rule's deterrent impact on law enforcement and then to explain that the police in *Davis* could not be deterred because they were "not culpable in any way."<sup>67</sup>

The remainder of the Article evaluates the Court's deterrence analysis in this line of cases and, in particular, its recent reliance in *Herring* and *Davis* on the concept of police culpability to exempt negligent violations from the reach of the exclusionary remedy. Before doing so, however, the next section explores three distinct models of deterrence that are then used in analyzing the Court's decisions.

## II. THE DETERRENCE THEORIES

Not surprisingly, the mechanics of deterrence, like other questions of human behavior, are subject to considerable dispute. In fact, commentators across the political spectrum representing a variety of jurisprudential disciplines have acknowledged that deterrence is not susceptible to empirical proof and thus at some level is largely a matter of conjecture.<sup>68</sup> In assessing the Court's work on deterrence in the good-faith cases, this Article considers three models of deterrence that have particular relevance to criminal procedure and the exclusionary rule: economic rational choice theory, organizational theory, and the expressivist account of punishment.

According to the rational choice theory favored by economists, we are all rational actors seeking to maximize our own utility. Risk-neutral offenders will therefore commit a crime—or police will infringe Fourth Amendment rights—when the expected utility of the violation exceeds the expected disutility of the punishment. As a result, the law deters unwanted behavior when the severity of the penalty, discounted by the

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omitted); *see also id.* at 2428 (relying on *Herring*'s references to gross negligence and recurring negligence in applying Supreme Court precedent to the facts of *Davis*).

<sup>66</sup> *See Davis*, 131 S. Ct. at 2428.

<sup>67</sup> *Id.* For a description of *Leon*'s three-part analysis, see *supra* notes 14–16 and accompanying text.

<sup>68</sup> *See, e.g.*, Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1368 (2008) ("Quantifying the behavioral effects of the exclusionary rule is . . . impossible."); Heffernan, *supra* note 11, at 864 (observing that "a deterrent effect . . . is extremely hard to verify, particularly when police illegality is at issue"); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 427–28 (1999) (discussing "the empirically speculative nature of deterrence"); Perrin et al., *supra* note 9, at 755 ("The dynamic of deterrence, steeped as it is in the motivations of fallible human beings, defies precise measurement . . ."); Posner, *supra* note 10, at 54 ("No one actually knows how effective the exclusionary rule is as a deterrent . . ."); Slobogin, *supra* note 1, at 368 (concluding that "[n]o one is going to win [this] empirical debate").

probability that the penalty will actually be imposed, outweighs the expected gain to the wrongdoer.<sup>69</sup> Under this theory, the exclusionary rule discourages an unconstitutional search if the loss of the evidence discovered, multiplied by the likelihood of exclusion, exceeds the value of the evidence the police anticipate finding. Deterrence can occur on either a specific or a general level, affecting either the particular police officer who conducted the search in question or law enforcement officials as a whole.<sup>70</sup>

Organizational theory, by contrast, criticizes rational choice theory for ignoring the impact organizations play in influencing individual actions. According to this account, the structure and culture of an institution “frame . . . the situation” for its agents, such that they are “no longer acting as isolated rational individuals,” “engaging in a rational actor calculus.”<sup>71</sup> Instead, they function as “part of a larger structure,” “absorbed in a larger cause,” with the result that “the organization’s rationality—its goals and means—dominates” in a way that may escape the attention of any one individual.<sup>72</sup> This process can then create “a recipe for organizational wrongdoing that will never trouble the conscience of anyone within the organization.”<sup>73</sup> Illustrative of this theory, police culture and its infamous “thin blue line” have created “a set of informal, cultural norms that are unique to the occupation of policing [and that] largely determine street-level

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<sup>69</sup> See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166–67, 169–70 (J.H. Burns & H.L.A. Hart eds., Univ. of London Athlone Press 1970) (1823); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968); Posner, *supra* note 10, at 54. For criticisms of this theory that have particular relevance to the exclusionary rule, see, for example, Kahan, *supra* note 68, at 427–28 (warning that “[w]e will rarely have reliable information” on the necessary variables); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1053, 1077–80, 1091–93 (2000) (pointing out that individuals often cannot process the amount of relevant information necessary to make rational decisions and are likely to underestimate the risk of getting caught); Slobogin, *supra* note 1, at 372 & n.24 (arguing that police are not likely to “make the kinds of dollars-and-cents calculations that [this theory] hypothesizes”).

<sup>70</sup> See *Leon*, 468 U.S. at 917, 918–19 (referring to both specific and general deterrence, and analyzing the exclusionary rule’s “systemic” deterrent on a wider audience”); Dripps, *supra* note 6, at 219–22 (arguing that these calculations are more likely to be made by police administrators rather than individual officers, and setting out an equation that also includes non-evidentiary benefits, opportunity costs, and civil liability costs).

<sup>71</sup> V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RES. ORG. BEHAV. 49, 64, 66 (1992).

<sup>72</sup> *Id.* at 66; cf. Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 554 (1981) (pointing out that organizational agents are “subject to bounded rationality” and sometimes “given to opportunism”).

<sup>73</sup> David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2355 (1992) (also noting that “[t]he division of labor is equally a division of knowledge”); see also Hamilton & Sanders, *supra* note 71, at 77 (discussing “the problem [of] piercing together the knowledge and behavior of several employees . . . even though no single employee knowingly broke the law”).

police conduct.”<sup>74</sup> Organizational theory therefore teaches that the exclusionary rule cannot hope to influence police behavior unless it speaks to police culture and leads to structural change.<sup>75</sup> Because this culture is not exclusively the creation of high-ranking police department officials, institutional reform requires not only “top-down pressure” but also “‘buy in’ from the ground up.”<sup>76</sup>

Finally, some academics have linked deterrence to philosophy’s expressive theory of punishment, which emphasizes that criminal punishment sends a message of “society’s authoritative moral condemnation.”<sup>77</sup> According to this account, punishment influences conduct by making criminal behavior not only more costly (as the economists emphasize) but also less desirable. This so-called “moralizing” or “educative” effect of punishment works through “preference adaptation,” whereby individuals, seeking to avoid the cognitive dissonance they feel when grouped with law-breakers, “internalize dispositions, outlooks, and tastes that conform to the social norms expressed in criminal prohibitions.”<sup>78</sup> Although others have focused on the expressive function of

<sup>74</sup> Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 512 (2004); see also JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 41, 42–43, 50 (3d ed. 1994) (attributing police officers’ distinctive “working personality” and “unusually high degree of occupational solidarity” to the danger, isolation, and authority characterizing their work); SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 14 (2005) (discussing the importance of “address[ing] underlying organizational and management causes” of law enforcement misconduct); Taslitz, *supra* note 36, at 552–61 (analogizing police culture to corporate culture); John Van Maanen, *Observations on the Making of Policemen*, 32 HUM. ORG. 407, 408 (1973) (describing the “distinct [police] subculture” and law enforcement’s “outsider role in the community”).

<sup>75</sup> See Armacost, *supra* note 74, at 545–46 (pointing out the need for “systemic” remedies rather than “individual-specific” ones); cf. *Davis v. United States*, 131 S. Ct. 2419, 2432 (2011) (noting that the exclusionary rule’s deterrent impact depends on “‘alter[ing] the behavior of individual law enforcement officers or the policies of their departments’” (quoting *Leon*, 468 U.S. at 916)); *Leon*, 468 U.S. at 920 n.20 (observing that “‘[t]he key to the [exclusionary] 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 Fourth Amendment and emphasize the need to operate within those limits’” (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977))); Laurin, *supra* note 55, at 684 (interpreting *Herring*’s reference to “‘systemic negligence’” as endorsing a view of the exclusionary rule “expressly aimed at institutional, in addition to individual, misconduct” (quoting *Herring v. United States*, 129 S. Ct. 695, 702, 704 (2009))).

<sup>76</sup> Armacost, *supra* note 74, at 521, 546; cf. Van Maanen, *supra* note 74, at 412 (reporting that new police officers are often advised by veteran colleagues that what they were taught at “the police academy . . . has little, if anything, to do with real police work”).

<sup>77</sup> Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996). See generally JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 95–118 (1970); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–80 (1981).

<sup>78</sup> Kahan & Nussbaum, *supra* note 77, at 356; see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996). *But cf.* Matthew D. Adler, *Expressive*

criminal punishment, expressive theory seems to have valuable lessons for criminal procedure as well: the exclusionary rule can be viewed as conveying a message that society condemns Fourth Amendment violations, in hopes of altering the preferences of police officers by “instilling” in them an “aversion[ ]” to unconstitutional searches.<sup>79</sup>

The next section takes the Supreme Court at its word that the exclusionary rule’s sole function is to discourage Fourth Amendment violations. It then uses these three theories to evaluate the Court’s deterrence analysis in the *Leon* line of cases.

### III. THE MECHANICS OF DETERRENCE

Given the empirical uncertainties and theoretical differences reflected in the varying models of deterrence described in the prior section, the Supreme Court can hardly be faulted for failing to articulate an ironclad theory as to precisely how the exclusionary rule works to deter constitutional violations. Nevertheless, evaluating the good-faith decisions on their own terms, their deterrence analysis is subject to criticism on two separate grounds. First, the Court seems to conveniently cherry-pick among different deterrence arguments in order to justify the outcome it wants to reach in a particular case. Second, the concept of culpability the Court recently injected into its deterrence analysis in recognizing an exception for negligent violations is not called for by the three theories of deterrence described above. The discussion that follows takes up these points in turn.

#### A. *The Incoherence of the Deterrence Analysis*

Examination of the deterrent arguments advanced in the Court’s various good-faith rulings reveals a number of internal inconsistencies. This section considers three of them: what type of police culpability the exclusionary rule can hope to deter; whether suppression underdeters or overdeters; and what relevance a police officer’s subjective state of mind has to the deterrence calculus.

First, the Supreme Court’s recent suggestion in *Herring* and *Davis* that the exclusionary rule offers insufficient deterrent value in cases of “simple, ‘isolated’ [police] negligence”<sup>80</sup> conflicts not only with well-established tort law principles, but also with

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*Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1417 (2000) (arguing that “[t]he criterion of deterrence, because it is causal, is necessarily nonexpressive,” and therefore “[a] deterrent account of expressive penalties . . . is not a genuine expressive theory”).

<sup>79</sup> Kahan, *supra* note 78, at 603; see Davies, *supra* note 5, at 1280 (characterizing the exclusionary rule as a sanction in part because it is “designed to communicate society’s view that police violations of constitutional rights are wrongful”); cf. ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 4 (2006) (viewing the Fourth Amendment as “taming . . . expressive political violence” on the part of the state).

<sup>80</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427–28 (quoting *Herring v. United States*,



the Court's own precedent. *Leon* itself recognized an exception only for *non-negligent* police conduct, and in fact cited to prior decisions acknowledging the exclusionary rule's ability to deter negligent Fourth Amendment violations. Thus, for example, the *Leon* Court noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct."<sup>81</sup> The circumstances where "the deterrence rationale loses much of its force," *Leon* made clear, are not where the police are "simply" negligent, but where they act "in complete good faith."<sup>82</sup> Given the rule's deterrent purpose, the Court continued in a similar vein, the suppression remedy requires that the officers "had knowledge, or may properly be charged with knowledge," that their conduct violated the Fourth Amendment.<sup>83</sup> This language would appear later in *Krull* and, surprisingly, in *Herring* as well even though it fails to support the majority's broader exemption for negligence: officials who can be "charged with knowledge" are those who should have realized they were acting unconstitutionally, i.e., those who were negligent.<sup>84</sup> The Court's refusal in *Herring* and *Davis* to apply the exclusionary rule to negligent Fourth Amendment violations thus represents a departure from its earlier precedents.

Moreover, in extending the good-faith exception to legislators in *Illinois v. Krull*, the Court made the opposite claim that the exclusionary rule cannot hope to deter Fourth Amendment violations at the other end of the culpability spectrum—deliberate, intentional ones. Acknowledging the possibility that "some legislators" might choose to vote in favor of unconstitutional legislation "for political purposes," the *Krull* Court expressed "doubt as to whether a legislator possessed with such fervor, and with such disregard for his oath to support the Constitution, would be significantly deterred" by the exclusionary rule.<sup>85</sup> By contrast, as noted above in the previous paragraph, the Court took a contrary position in *Leon* and presumed that the exclusionary rule can discourage intentional Fourth Amendment violations, observing that exclusion's deterrent aim "necessarily assumes . . . willful, or at the very least negligent conduct" on the part of the police.<sup>86</sup> Thus, the Court's good-faith rulings have

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129 S. Ct. 695, 698 (2009)). For discussion of academic authority concluding that negligent misconduct can effectively be deterred, see *infra* note 129 and accompanying text.

<sup>81</sup> *United States v. Leon*, 468 U.S. 897, 919 (1984) (emphasis added) (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), and *United States v. Peltier*, 422 U.S. 531, 539 (1975)) (internal quotation marks omitted).

<sup>82</sup> *Id.* (quoting *Tucker*, 417 U.S. at 447, and *Peltier*, 422 U.S. at 539).

<sup>83</sup> *Id.* (emphasis added) (quoting *Peltier*, 422 U.S. at 542) (internal quotation marks omitted).

<sup>84</sup> See *Herring*, 129 S. Ct. at 701; *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987).

<sup>85</sup> *Krull*, 480 U.S. at 352 n.8. Although the Court's comment was referring to legislators rather than law enforcement officials, its argument seemed to hinge on the level of the individual actor's culpability rather than the particular office she held.

<sup>86</sup> *Leon*, 468 U.S. at 919 (emphasis added) (quoting *Tucker*, 417 U.S. at 447, and *Peltier*, 422 U.S. at 539) (internal quotation marks omitted). Justice White, the author of the majority opinion in *Leon* and an early proponent of the good-faith exception, similarly noted in a prior dissent that "[s]ome policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed." *Rakas v. Illinois*, 439 U.S. 128, 169 (1978) (White, J., dissenting).

not adopted a consistent view on the level of culpability the exclusionary rule can be expected to deter.

Second, *Herring*'s claim that the exclusionary rule cannot meaningfully deter simple negligence is inconsistent with the Court's oft-stated fear that strictly enforcing the exclusionary remedy will *overdeter* the police. The overdeterrence concern was mentioned in passing in *Leon* as the Court observed that suppressing evidence in cases where police acted reasonably "can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty."<sup>87</sup> But overdeterrence has received more attention in some of the Court's subsequent rulings. Reiterating the point made in *Leon* and quoted above, the Court's most recent opinion in *Davis v. United States* devoted a paragraph to overdeterrence, saying pointedly that "[a]bout all that exclusion would deter in this case is conscientious police work."<sup>88</sup> And in *Hudson v. Michigan*, the Court listed as one of the costs of suppressing evidence uncovered following a knock-and-announce violation the risk that police "would be inclined to wait longer than the law requires" before entering to execute a warrant.<sup>89</sup> The Court can't have it both ways—the exclusionary rule cannot both underdeter and overdeter at the same time.<sup>90</sup>

In addition to raising the specter of overdeterrence as one of the costs of exclusion, *Hudson*'s discussion of the deterrent benefits of suppression was very different from the deterrence analysis in the Court's other decisions. Unlike each of the other opinions in the *Leon* line of cases, *Hudson* did not mention the police officers' lack of culpability. And, in fact, there was good reason for this omission because the exception created in *Hudson* covers even deliberate noncompliance with the knock-and-announce requirement. Rather, as noted above, the Court's deterrence rationale in *Hudson* was that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act," and police have little to gain by foregoing the precaution of knocking because they are likely to uncover the same evidence even if they faithfully follow the rule.<sup>91</sup> Not only is this reasoning inconsistent with the overdeterrence argument (made just one paragraph earlier in the *Hudson* opinion) that the exclusionary rule incentivizes the police to wait too long before entering, thus leading to "preventable violence against officers . . . and the destruction of evidence," it differs from the deterrence rationale relied on in the Court's other opinions and is contradicted by classic economic theory.<sup>92</sup>

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<sup>87</sup> *Leon*, 468 U.S. at 920 (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)) (internal quotation marks omitted); see also *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (quoting the same language); *Krull*, 480 U.S. at 349 (quoting the same language).

<sup>88</sup> 131 S. Ct. 2419, 2429 (2011).

<sup>89</sup> 547 U.S. 586, 595 (2006).

<sup>90</sup> See Laurin, *supra* note 55, at 710 (charging that this reasoning "add[s] a heads-I-win, tails-you-lose dimension to cost-benefit analysis").

<sup>91</sup> *Hudson*, 547 U.S. at 596.

<sup>92</sup> *Id.* at 595.

Conceding that the expected gain of violating the Constitution, the “strength of the incentive” in the *Hudson* Court’s terms,<sup>93</sup> is a relevant factor in the deterrence analysis, it is only one side of the equation. Holding constant the other side of the equation—the loss occasioned by exclusion, discounted by the likelihood of that loss—the Court is correct that a lesser penalty can achieve the same level of deterrence if the expected gains are lower.<sup>94</sup> But the Court does not hold the other side of the equation constant; in fact, by making the exclusionary rule unavailable for knock-and-announce violations, it reduces both the loss and the likelihood of that loss to zero. Thus, after *Hudson*, the rational police officer will have no reason to knock and announce because *any* gain that might be realized from failing to do so, no matter how trivial, will easily outweigh the cost of compliance.<sup>95</sup>

The final inconsistency reflected in the Court’s deterrence analysis in these cases is the introduction of the concept of culpability in the two most recent opinions, *Herring* and *Davis*. Notwithstanding the Court’s protestations in *Davis* that the link between culpability and deterrence represents “[t]he basic insight of the *Leon* line of cases,”<sup>96</sup> in fact it was the creation of the Court’s ruling in *Herring*.<sup>97</sup> *Herring* itself purported to draw precedential support from a statement in *Leon* that was taken out of context,<sup>98</sup> a

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<sup>93</sup> *Id.* at 596.

<sup>94</sup> See *supra* note 69 and accompanying text.

<sup>95</sup> Cf. A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 104 (1989) (explaining that an actor who “will not be sued whether or not he obeys the law . . . obviously will not obey the law [because] obeying the law would cost him . . . but would not benefit him” (emphasis omitted)). For other criticisms of *Hudson*’s deterrence analysis, see, for example, Gray, *supra* note 35, at 68 (observing that even if knock-and-announce violations are “not . . . motivated by an interest in seizing evidence,” exclusion would “serve as a significant general deterrent capable of effecting systemic conformance with the knock-and-announce requirement”); Tomkovicz, *supra* note 6, at 1829 n.52 (pointing out that a police officer’s “objectively unsupportable, but nonetheless genuine, fear” that knocking will be met with violence “could provide a stronger incentive than the discovery of evidence” for failing to comply with the knock-and-announce rule).

<sup>96</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

<sup>97</sup> See *id.* at 2435 (Sotomayor, J., concurring) (noting that, under the Court’s precedents, an officer’s culpability “is not itself dispositive” but is only “relevant because it may inform” the deterrence analysis).

<sup>98</sup> The *Herring* majority quoted *Leon* for the proposition that “‘an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus’ of applying the exclusionary rule.” *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (quoting *United States v. Leon*, 468 U.S. 897, 911 (1984)); see also *Davis*, 131 S. Ct. at 2427 (noting that “[i]n a line of cases beginning with *United States v. Leon*, we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the ‘flagrancy of the police misconduct’ at issue” (quoting *Leon*, 468 U.S. at 911)). But the Court failed to note that this portion of the *Leon* opinion was not discussing the exclusionary remedy generally. Rather, it was describing the law governing a specific Fourth Amendment rule—the attenuation exception to the fruits of the poisonous tree doctrine—in the course of listing various exceptions to the reach of the exclusionary rule.

quotation from *Krull* that directly contradicted its ruling,<sup>99</sup> and an earlier decision that involved the “separate” question whether a substantive Fourth Amendment violation had been proven,<sup>100</sup> not the remedial question before the Court in *Leon* and *Herring*.<sup>101</sup>

In a last-ditch effort to find precedent for requiring more than simple negligence to trigger exclusion, the *Herring* majority claimed that since *Leon* it had not suppressed evidence in a case “where the police conduct was no more intentional or culpable” than the “nonrecurring and attenuated negligence” present on the facts of *Herring*.<sup>102</sup> But this statement cannot be squared with rulings like *Kyllo v. United States*<sup>103</sup> and the 2011 Term’s *United States v. Jones*,<sup>104</sup> which found that the police had conducted a “search” within the meaning of the Fourth Amendment by using, respectively, a thermal imager and a GPS device. Given the split in lower court authority in both cases,<sup>105</sup>

<sup>99</sup> See *supra* notes 83–84 and accompanying text.

<sup>100</sup> *Leon*, 468 U.S. at 906; see also *Arizona v. Evans*, 514 U.S. 1, 13 (1995) (rejecting as “dubious” the “precedential value” of an earlier decision that involved the substantive question whether police had violated the Fourth Amendment, noting that the Court no longer “treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule” but instead considered “the issue of exclusion . . . separate from whether the Fourth Amendment has been violated”). For further discussion of the Court’s decision to separate the substantive and remedial aspects of the Fourth Amendment, see *infra* notes 169–72 and accompanying text.

<sup>101</sup> The Court’s opinion in *Herring* cited by way of “analogy” *Franks v. Delaware*, 438 U.S. 154 (1978), which held that the Fourth Amendment is not violated by the refusal to hold an evidentiary hearing so that a defendant can challenge the veracity of the affidavit police filed to obtain a warrant absent “allegations of deliberate falsehood or of reckless disregard for the truth.” *Id.* at 171; see *Herring*, 129 S. Ct. at 703; see also Alschuler, *supra* note 7, at 487 (pointing out that *Franks* raised an “issue of deference to a prior judicial decision” and therefore “the analogy between *Franks* and *Herring* was not close”); LaFave, *supra* note 7, at 767 (noting that *Franks* was based on the Court’s desire to avoid a “disfavored,” “lengthy, time-consuming evidentiary hearing”); Laurin, *supra* note 55, at 681–82 (describing *Franks* as “an outlier . . . deeply rooted in analysis of the historical and functional role of the magistrate”).

In addition to its attempt to find support in Supreme Court precedent, the *Herring* Court also relied on a dissenting opinion as well as a law review article written in the wake of *Mapp* by Judge Henry Friendly, an outspoken critic of the incorporation doctrine and the exclusionary rule. See *Herring*, 129 S. Ct. at 702 (citing *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., dissenting); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965)).

<sup>102</sup> *Herring*, 129 S. Ct. at 702. The Court repeated a milder version of this comment in *Davis*, stating that “in 27 years of practice under *Leon*’s good-faith exception, we have ‘never applied’ the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.” *Davis*, 131 S. Ct. at 2429 (quoting *Herring*, 129 S. Ct. at 702). Subject to the qualifier discussed in the remainder of this paragraph in the *Davis* opinion—that “nonculpable” police conduct involves reasonable reliance on an independent third party—*Davis*’s statement accurately described the *Leon* line of cases. See *id.*

<sup>103</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>104</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>105</sup> See *Kyllo*, 533 U.S. at 46 n.4 (Stevens, J., dissenting) (citing lower court opinions); 1 LAFAVE, *supra* note 41, § 2.2(e), at 495 (4th ed. 2004) (observing that the Court’s decision

it is hard to argue that the officers who conducted the searches in *Kyllo* and *Jones* acted with a culpability greater than negligence.<sup>106</sup>

To be sure, in a limited sense *Leon* did introduce an element of culpability into the exclusionary rule analysis, but only so far as to create an exception confined to circumstances where the police lack any culpability whatsoever. But declining to impose strict liability—and then only for the narrow category of cases where police rely on an independent third party—is a far cry from giving culpability center stage in determining the scope of the exclusionary rule or adopting a sliding scale remedy depending on the extent of police culpability.<sup>107</sup> For example, despite proposals advanced by some academics, the Court has not seen fit to impose more severe sanctions on bad-faith violations of the Fourth Amendment.<sup>108</sup> And, as described above, a discussion of the officers' culpability in violating the knock-and-announce requirement in *Hudson* was conspicuously absent.

Moreover, even if *Leon* did envision a role for culpability in determining the reach of the exclusionary remedy, the standard adopted in *Herring* is quite different from the “objective” “standard of reasonableness” articulated in *Leon* and its earlier progeny.<sup>109</sup> Notwithstanding the “good-faith” moniker, the *Leon* Court refused to allow “subjective good faith” on the part of the police to justify the use of illegally seized evidence for fear that “the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.”<sup>110</sup> Rather, *Leon* expressly cautioned that the “good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.”<sup>111</sup>

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in *Kyllo* disagreed with an “overwhelming majority” of lower courts); *id.* § 2.7(e), at 168 (Supp. 2011) (citing conflicting lower court decisions predating *Jones*).

<sup>106</sup> This is not to say that *Leon* should be extended to such cases. Doing so would mean, as Justice Breyer pointed out in his *Davis* dissent, that the good-faith exception would “swallow the exclusionary rule.” *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting).

<sup>107</sup> *But cf.* Davies, *supra* note 5, at 1316–17 (resting her argument that the Court views police culpability as relevant to the exclusionary rule entirely on *Leon*).

<sup>108</sup> *Cf.* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 123 (1982) (taking the position that “searches and seizures must be ‘subjectively’ as well as ‘objectively’ constitutional”); Davies, *supra* note 5, at 1324–29 (suggesting that evidence derived from deliberate unconstitutional searches should not be subject to the Court’s cost-benefit balancing test); George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith “Exception” to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 21–23 (1993) (arguing that the Court’s division of Fourth Amendment intrusions into “good-faith” and “[a]ll other violations” is “too crude,” and proposing recognition of a third category—“bad-faith violations”—that would trigger “a broader, less constrained exclusionary rule”).

<sup>109</sup> *United States v. Leon*, 468 U.S. 897, 919–20 n.20 (1984); *see also* *Illinois v. Krull*, 480 U.S. 340, 355 (1987) (“As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers.”).

<sup>110</sup> *Leon*, 468 U.S. at 915 n.13 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (internal quotation marks omitted); *see Herring v. United States*, 129 S. Ct. 695, 701 (2009) (admitting that the term “good faith” was “perhaps confusing[ ]” as a reference to an objective standard).

<sup>111</sup> *Leon*, 468 U.S. at 922 n.23.

In *Herring*, by contrast, although the Court quoted *Leon*'s objective standard and claimed that it was similarly calling for an objective "analysis of deterrence and culpability . . . not an 'inquiry into the subjective awareness of arresting officers,'"<sup>112</sup> once the Court tread beyond negligence (or perhaps gross negligence<sup>113</sup>) and into the realm of "reckless" and especially "deliberate" conduct, it seemed to invite a subjective inquiry that turns on a particular police officer's actual state of mind and not that of *Leon*'s "reasonably well trained officer."<sup>114</sup> As Justice Ginsburg's *Herring* dissent aptly noted, "[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police."<sup>115</sup>

In defending the objectivity of its analysis, the *Herring* majority claimed that an officer's "knowledge and experience" can be taken into account as one of the relevant "circumstances" in applying an objective reasonable person test without converting the standard to a subjective one.<sup>116</sup> But while an inquiry focused on the reasonable police officer with similar information and experience might arguably retain the objectivity of a reasonable-person-under-all-the-circumstances test,<sup>117</sup> that is a negligence standard

<sup>112</sup> *Herring*, 129 S. Ct. at 703 (quoting Reply Brief for Petitioner at 4–5, *Herring v. United States*, 129 S. Ct. 695 (2009) (No. 07-513)).

<sup>113</sup> See *Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994) (equating gross negligence with civil recklessness); LaFave, *supra* note 7, at 784 (suggesting that *Herring* intended "gross negligence" to refer to an objective standard that required "a greater departure from the reasonable man standard").

<sup>114</sup> See *Farmer*, 511 U.S. at 836–39 (observing that civil cases typically apply an objective standard of recklessness whereas criminal cases use a subjective test, but then going on to articulate a subjective standard for that civil constitutional tort case). See generally MODEL PENAL CODE AND COMMENTARIES § 2.02(2)(a)–(c) (1985) [hereinafter MODEL PENAL CODE] (defining purpose, knowledge, and recklessness); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (2010) (defining recklessness).

<sup>115</sup> *Herring*, 129 S. Ct. at 710 n.7 (Ginsburg, J., dissenting); see also Alschuler, *supra* note 7, at 485 (observing that "there is no such thing as 'objectively deliberate wrongdoing'").

<sup>116</sup> *Herring*, 129 S. Ct. at 703 (reasoning that considering an officer's knowledge and experience "does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent"). For discussion of the conflicting positions taken by the courts on the relevance of a particular police officer's experience in assessing probable cause, and an argument that considering police training and experience, and certainly knowledge, does turn the definition into a subjective inquiry, see Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751 (2010).

<sup>117</sup> Compare Alschuler, *supra* note 7, at 487 n.125 (viewing *Herring* as inconsistent with *Leon* because "[t]he reason for hypothesizing a 'reasonably well trained officer' was to avoid inquiries about the extent of 'a particular officer's knowledge'"), with Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 549 (1988) (arguing that negligence "concentrat[es] on objective components" but also "involves a subjective inquiry" because it "involves a judgment that, based on what the actor knew, he or she should have known something else"). For

and not one of the higher levels of culpability required by *Herring*.<sup>118</sup> The point is not that the Court's concept of negligence was a subjective one, but that proof of reckless—and certainly deliberate—misconduct envisions a subjective inquiry into the state of mind of the actual officer whose actions are in question.

Professor Laurin has offered a different explanation of *Herring*, comparing the discussion of objective and subjective standards in that opinion to the “similar dance” the Court has performed in its qualified immunity jurisprudence.<sup>119</sup> Admittedly, the Court has expressly equated the inquiry into objective reasonableness required by *Leon*'s good-faith exception with the qualified immunity defense, which is available to police officers in constitutional tort suits unless they “violate[d] clearly established . . . constitutional rights of which a reasonable person would have known.”<sup>120</sup> But, again, both the good-faith exception and qualified immunity are defined by objective negligence-level standards and not subjective standards like those invoked in *Herring*.<sup>121</sup> Nevertheless, Professor Laurin suggests that the *Herring* Court's decision

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a general discussion of the murky line between objective and subjective standards when a particular actor's characteristics and circumstances are incorporated into the objective reasonable person, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 513 (1978) (“If the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances.”); Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 133–43 (2007).

<sup>118</sup> See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”); KEETON ET AL., *supra* note 33, at 175 (defining negligence as “a failure to do what the reasonable person would do ‘under the same or similar circumstances’” (quoting RESTATEMENT (SECOND) OF TORTS § 283 (1965))).

<sup>119</sup> Laurin, *supra* note 55, at 728.

<sup>120</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (articulating the qualified immunity defense available to executive-branch officials in constitutional tort suits); see also *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (observing that “the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer” (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)) (internal quotation marks omitted)). For authorities questioning the comparison between the good-faith exception and qualified immunity, see, for example, *Illinois v. Krull*, 480 U.S. 340, 368 (1987) (O'Connor, J., dissenting) (observing that “suppression of illegally obtained evidence does not implicate [*Harlow*'s] concern” that “fairness . . . as well as public policy . . . dictates that individual government officers ought not be subjected to damages suits for arguable constitutional violations”); *United States v. Leon*, 468 U.S. 897, 922 & n.23 (1984) (citing *Harlow* though recognizing that “[t]he situations are not perfectly analogous”); Kerr, *supra* note 8, at 1110 (arguing that the two are “conceptually different” because qualified immunity focuses on the reasonableness of “one institutional player” whereas the good-faith exception focuses on the police “considered as a collective entity”); Laurin, *supra* note 55, at 676, 677 (explaining that the process of “borrowing and convergence” between the two doctrines has had “an undesirable doubling-down effect” such that “[t]he overall mix of opportunities for constitutional redress is reduced not once, but twice”).

<sup>121</sup> See Alschuler, *supra* note 7, at 488 (equating *Leon*'s standard with “ordinary negligence”); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999)

to take into account a police officer's information and experience does not "necessitate examination of an official's 'subjective beliefs.'"<sup>122</sup> In essence, she claims, *Herring* drew a line between "motive[ ] or purpose" (which she acknowledges can "only be proved through subjective inquiry" and is therefore "irrelevant to the qualified immunity inquiry") and knowledge "in criminal law terms."<sup>123</sup> This explanation of *Herring* breaks down on several levels. First, "belief" and "knowledge" are similar constructs, and therefore examination of a police officer's knowledge by definition seems to involve an inquiry into her beliefs.<sup>124</sup> Second, criminal law defines both knowledge and purpose in entirely subjective terms, and thus even an assessment of a police officer's knowledge strays from the objective analysis the *Herring* Court purported to adopt.<sup>125</sup> And finally, even if there is some room to distinguish the "information" an officer had from her "beliefs" and "knowledge," *Herring* also speaks in terms of "deliberate" police misconduct.<sup>126</sup> Consistent with the Court's general reluctance in Fourth Amendment cases to inquire into law enforcement's "ulterior motive,"<sup>127</sup> *Herring*'s reference to "deliberate" misconduct may not require analysis of the *motivation* underlying a police officer's action, but it does trigger an inquiry (again, a subjective one) into the police officer's *purpose* or *intent*.<sup>128</sup>

Thus, the role played by a police officer's culpability is one of several points of inconsistency evident in the deterrence rationales the Court has advanced in the *Leon* line of cases. The next section goes on to evaluate whether the *Herring* Court was justified in introducing an assessment of police culpability into the deterrence analysis and exempting negligent constitutional violations from the reach of the exclusionary rule.

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(observing that "[g]enerally speaking, the kind of fault required [in constitutional tort suits] is negligence with respect to illegality"). *But see* Laurin, *supra* note 55, at 726 & n.283 (taking the contrary view that the Court's qualified immunity cases "approach[ ] a standard sounding more in gross negligence or recklessness"); Taslitz, *supra* note 36, at 495–502 (arguing that *Leon* requires more than ordinary tort negligence).

<sup>122</sup> Laurin, *supra* note 55, at 728.

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g.,* Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 363 (2006) (observing that "[i]t cannot, or at least should not, be said that facts are 'known' to the officer if he does not believe those 'facts'"); Kinports, *supra* note 116, at 780 (arguing that any "purported distinction [between knowledge and belief] quickly breaks down").

<sup>125</sup> *See* MODEL PENAL CODE, *supra* note 114, § 2.02(2)(a)–(b).

<sup>126</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

<sup>127</sup> *Whren v. United States*, 517 U.S. 806, 812 (1996) ("We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."). *But cf.* Kinports, *supra* note 117, at 77–95 (discussing the fluctuation between objective and subjective standards characterizing the Supreme Court's Fourth Amendment jurisprudence).

<sup>128</sup> For an explanation of the distinction between motive and intent, see FLETCHER, *supra* note 117, at 452; 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.3(a), at 358–60 (2d ed. 2003).



*B. The Tenuous Connection Between Culpability and Deterrence*

The link the Court has recently drawn between deterrence and culpability not only signals a change in the Court's exclusionary rule jurisprudence, but it may also be unwarranted. Conceding a good-faith exception for cases involving reasonable police reliance on an independent third party, the weight of authority agrees that the law can expect to deter negligent behavior<sup>129</sup> and even the *Herring* majority acknowledged that the exclusionary rule could have some impact on negligent misconduct.<sup>130</sup> Moreover, under the three accounts of deterrence described above in Part II—economic rational choice theory, organizational theory, and expressive theory—a police officer's culpability is of questionable relevance to the deterrence analysis.<sup>131</sup> Accordingly, *Herring's* exemption for negligent Fourth Amendment violations does not find clear justification in any of the deterrence models.

Rational choice theory's support for *Herring's* requirement of police culpability greater than negligence depends on two questionable assumptions. The first is that negligent misdeeds are harder to deter than more intentional ones. Although a number of scholars have endorsed that position,<sup>132</sup> others have defended the contrary view advanced in *Illinois v. Krull* that bad-faith violations are less deterrable.<sup>133</sup> Resolution of this controversy may depend on whether the exclusionary rule is primarily directed at "good cops" or "bad cops"—those officers who are dutifully trying to comply with the intricacies of the Court's Fourth Amendment jurisprudence or those who are inclined to manipulate and circumvent those rules in order to uncover evidence.<sup>134</sup>

Even if the *Herring* Court made the right call on this first question, it is not obvious what impact barriers to deterrence have on the appropriate level of sanction under classic economic theory. Admittedly, *Herring's* assumption that more severe sanctions are necessary for behavior that is more difficult to deter seems to be the

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<sup>129</sup> See, e.g., MODEL PENAL CODE, *supra* note 114, § 2.02 cmt. at 243; LaFave, *supra* note 7, at 768–70; Posner, *supra* note 10, at 71.

<sup>130</sup> See *Herring*, 129 S. Ct. at 702 n.4.

<sup>131</sup> For a discussion of the tension between the Court's culpability requirement and its purported focus on deterrence rather than retribution, see *infra* notes 196–201 and accompanying text.

<sup>132</sup> See, e.g., Burkoff, *supra* note 108, at 112 n.208; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1537 (1984); Laurin, *supra* note 55, at 682–83 & n.54; Thomas & Pollack, *supra* note 108, at 33.

<sup>133</sup> See, e.g., Davies, *supra* note 5, at 1288 n.58 (citing sources); cf. Bradley, *supra* note 56, at 9 (arguing that the exclusionary rule is less likely to deter a reckless officer than a negligent one); Tomkovicz, *supra* note 6, at 1863 n.225 (reasoning that more culpable violations lead to greater punishment either because they "require[ ] a more potent deterrent or because society has a greater interest in discouraging" them). For a description of the *Krull* Court's position, see *supra* notes 85–86 and accompanying text.

<sup>134</sup> Compare Alschuler, *supra* note 7, at 494 n.156 (warning that the exclusionary rule should not lose sight of the "good cop"), and Steiker, *supra* note 11, at 852 (same), with Gray, *supra* note 35, at 44 (taking the contrary view).

predominant view.<sup>135</sup> But others take the opposite approach on the ground that the expenditure of resources on punishing less deterrable crimes is inefficient.<sup>136</sup> Thus, if rational choice theory is the guide, deterrability arguably “can cut either way” and the *Herring* Court may have jumped too quickly to the conclusion that a lesser sanction was appropriate for the Fourth Amendment violations it deemed harder to deter.<sup>137</sup>

Moreover, the economic account of deterrence teaches that decreasing either the severity or the probability of the sanction lowers the cost of constitutional violations and thus increases the likelihood that a rational police officer will flout Fourth Amendment rules. In the language of *Freakonomics*, “[i]ncentives are the cornerstone of modern life.”<sup>138</sup> An exemption for negligence makes such violations costless and therefore removes any reason for taking steps to avoid them. Furthermore, the opportunity to litigate police officers’ state of mind affords the government an additional path to prevent suppression of illegally seized evidence. Even after losing on the substantive Fourth Amendment issue and the good-faith exception, prosecutors can still maintain that the constitutional violation was the product of simple negligence. Opening this door can only serve to decrease the likelihood of exclusion, thereby diminishing the rational police officer’s incentive to comply with the Constitution.<sup>139</sup>

The Court’s linking of culpability and deterrence finds even less support in organizational theories of deterrence. Organizational norms and culture develop incrementally, over time, and in complex ways. Given that “the actions of multiple employees converge” in creating institutional culture, some of these actors may not even be aware of what others in the organization are doing.<sup>140</sup> As a result, the organization may well “cause unintended or inadvertent harms that go beyond the actions of any one individual.”<sup>141</sup>

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<sup>135</sup> See, e.g., Cooter, *supra* note 132, at 1537 (noting that “sanctions increase” for “act[s] indicating more resistance to deterrence”); Posner, *supra* note 34, at 1216 (“If our object is to minimize the amount of crime, we must ‘charge’ more to people who value that activity more.”).

<sup>136</sup> See, e.g., Posner, *supra* note 34, at 1223 (summarizing the view that for “less deterrable” crimes, “punishment is less efficacious, less worthwhile, and therefore society should buy less of it”); cf. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1291 (1937) (pointing out that “it is idle to argue, without qualification, that the greater the temptation the more severe a deterrent penalty ought to be” because other factors, such as “variations in character,” must also be considered).

<sup>137</sup> Kahan, *supra* note 68, at 469.

<sup>138</sup> STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 11 (2005) (emphasis omitted).

<sup>139</sup> Cf. Davies, *supra* note 5, at 1319 (commenting that “the many restrictions placed on the use of the [exclusionary] sanction . . . have reduced its potency”); Mertens & Wasserstrom, *supra* note 5, at 388 (noting that “the cumulative effect of . . . exceptions may be great, even though the marginal loss of deterrence . . . in a particular context may seem small”).

<sup>140</sup> Armacost, *supra* note 74, at 514.

<sup>141</sup> *Id.* at 514–15 (describing the problem of “fragmented knowledge”); see also Luban et al., *supra* note 73, at 2383 (discussing “the great potential for harm arising from the division of labor and fragmentation of knowledge in a corporate or bureaucratic organization”).

Focusing only on the culpability of individual police officers, or even of the police department as a whole, in determining the reach of the exclusionary rule and creating an exception for negligent violations thus ignores the lessons of organizational theory and hinders the exclusionary rule's ability to effect institutional change. It is challenging enough to shape individual behavior, much less to have the influence on institutional culture required by organizational theories of deterrence. If no consequence follows from negligent violations, police departments have little reason to try to make the difficult adjustments necessary to change their culture so as to prevent those violations.

Culpability's relevance to the expressive account of deterrence is more open to question. Society chooses what conduct to denounce, and it conceivably could decide to express greater moral condemnation of intentional instances of constitutional misconduct than less culpable ones, perhaps because, to paraphrase Justice Holmes, deliberately kicking a dog is more evil than accidentally stepping on its tail.<sup>142</sup> But more culpable mental states do not inevitably call for greater reproach. In fact, a tension has long existed in criminal law between those who would base assessments of blameworthiness on the amount of harm the defendant caused and those who would focus on her state of mind.<sup>143</sup> Here too, a police officer who deliberately ignores Fourth Amendment limits on searches may be more deserving of censure than one who makes a careless mistake in the heat of the moment. Alternatively, an officer whose unconscious race bias leads her to routinely stop and frisk persons of color without reasonable suspicion may merit greater condemnation than one who intentionally conducts an illegal search in order to get a particularly dangerous criminal off the streets.<sup>144</sup> Thus, the expressivist model of deterrence does not clearly call for exempting negligent violations from the exclusionary sanction.

Additionally, for expressivists, sanctions lose their expressive power to influence behavior if they do not "forcefully . . . communicate society's condemnation," if they "condemn . . . more ambiguously."<sup>145</sup> And because "actions speak louder than words,"

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<sup>142</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Boston, Little, Brown & Co. 1881) ("[E]ven a dog distinguishes between being stumbled over and being kicked.").

<sup>143</sup> See, e.g., FLETCHER, *supra* note 117, at 237-39 (distinguishing between "harm-orientation" and "act-orientation"); Hart, *supra* note 34, at 413, 426 (suggesting that more culpable acts are more deserving of criminal punishment, but likewise noting that the "relative blameworthiness" of different crimes also takes into account "the relative extent of the harm characteristically done"); cf. Kahan & Nussbaum, *supra* note 77, at 353 (arguing that even two intentional murders may warrant different levels of condemnation depending on the killers' "emotional motivation" and how "reprehensible [a] message [is] implicit" in their conduct).

<sup>144</sup> See, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002) (observing that experience with the police "affects the everyday lives of people of color"); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660, 681 (1994) (arguing that the disproportionate number of *Terry* stops directed at the poor and people of color "perpetuates a cycle of mistrust and suspicion," thereby "widening the racial divide in the United States").

<sup>145</sup> Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 383, 384 (1997).

“mere verbal denunciation” tends to “trivialize the offense” and therefore is not “an adequate substitute for hard treatment in expressing condemnation.”<sup>146</sup> Accordingly, a court that merely announces that police have conducted an unconstitutional search, but then denies an exclusionary remedy and allows the prosecution to introduce the illegally seized evidence, is less likely to succeed in influencing police behavior under an expressive model of deterrence.<sup>147</sup>

To be sure, expressivists have argued that the law, acting expressively, can change behavior without imposing a sanction but instead by affecting social norms.<sup>148</sup> Given the impact of peer pressure and social influence, we tend to follow in each others’ footsteps and the law can therefore influence behavior by changing our expectations, our “perception of . . . others’ behaviors and attitudes.”<sup>149</sup> By the same token, measures that merely increase penalties can be ineffective if they do nothing to alter peer pressure and social influence. And, in fact, Professor Kahan has argued that additional sanctions can even be counterproductive if they create the perception either that misbehavior is widespread<sup>150</sup> or that the penalties are unjust.<sup>151</sup>

Applying these expressivist lessons to the Fourth Amendment, then, more rigorous use of the exclusionary remedy might backfire and increase the incidence of

<sup>146</sup> Kahan, *supra* note 78, at 600–01.

<sup>147</sup> See, e.g., Calabresi, *supra* note 10, at 114 (pointing out that “in the absence of . . . incentives, teaching and preaching are not going to have much of an effect” on the police); Dripps, *supra* note 6, at 238 (finding that “the training the police receive seems to be more concerned with admissibility than with legality”); LaFave, *supra* note 35, at 359 (observing that the police are not “inherently evil, but rather . . . they are no less likely than the rest of us to equate admissibility with legality”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2543 (1996) (noting that the police “may see little reason to continue to obey conduct rules that are consistently unenforced in criminal prosecutions”).

<sup>148</sup> See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 595 (1998) (explaining that “the law can create a social norm” and “cause most people to switch behavior from wrong to right”); Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000) (“[L]aw influences behavior independent of the sanctions it threatens to impose [because] law works by what it says in addition to what it does.”).

<sup>149</sup> Kahan, *supra* note 145, at 350–51, 354; see also McAdams, *supra* note 148, at 1652.

<sup>150</sup> See Kahan, *supra* note 145, at 395 (noting that “a community is more likely to be law-abiding when its members *perceive* that it is”); Kahan, *supra* note 78, at 604 (explaining that if people “believe that disobedience is rampant, their commitment to following the law diminishes” because of the “‘desire not to be suckered’”).

<sup>151</sup> See Kahan, *supra* note 145, at 375 (noting that if “[d]elinquency is status-enhancing” for gang members and they “view willingness to break the law as a sign of strength and courage,” then “‘rais[ing] the price’ of gang activity can actually reinforce the meanings that point social influence in the direction of gang membership”); Kahan, *supra* note 78, at 604 (observing that “[i]ndividuals are more disposed to obey particular laws, whether or not those laws accord with their moral beliefs, when they perceive the criminal law as a whole to be basically just”); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (warning that “the criminal law’s moral credibility is essential to effective crime control”).

constitutional violations if law enforcement officials are led to believe that unconstitutional searches are widespread and that other police officers are routinely disobeying constitutional norms, or if it confirms their view that criminal procedure is overly solicitous of defendants' rights and thus reinforces their siege mentality and "us v. them" attitude.<sup>152</sup> But imposing *any* sanction for Fourth Amendment violations could conceivably backfire in this way, and the exclusionary rule may be less likely to have such unintended consequences than alternative remedial mechanisms. Professor Kahan has made the expressivist case for increasing the certainty and lowering the severity of criminal penalties on the grounds that "fewer are likely to draw the initial inference that crime pays" if punishment is more certain and making it less severe "prevents resentment from eroding the disposition to obey."<sup>153</sup> Studies show that police prefer the exclusionary rule because they view other sanctions, especially more direct ones, as more onerous,<sup>154</sup> and therefore increasing the certainty of suppression in cases where Fourth Amendment violations are proven may send the most effective expressive message.

The exclusionary rule's expressive function is undermined not only by the absence of sanction but also by the mixed signals the Court's Fourth Amendment precedents have sent. In recent years, Supreme Court opinions have painted the exclusionary rule in a particularly unfavorable light, calling it a "bitter pill"<sup>155</sup> and a "last resort."<sup>156</sup> Likewise, the Court's suggestions that an exclusionary remedy is available only in the "unusual" case,<sup>157</sup> where its deterrent purposes are "*most efficaciously served*"<sup>158</sup> or where the defendant can clear "a high obstacle,"<sup>159</sup> have a similar effect on the clarity of the expressive message. And as the Court pushes its thumb with increasing force on the scales of the cost-benefit balancing test, admonishing that "deterrent value is a 'necessary condition for exclusion,' but . . . not 'a sufficient' one"<sup>160</sup> and calling for heightened proof of deterrence—deterrence that is "appreciable"<sup>161</sup> and

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<sup>152</sup> See Slobogin, *supra* note 1, at 383 (relying on legitimacy-compliance theory in arguing that police are less likely to comply with Fourth Amendment dictates because they "perceive the present exclusionary regime to be illegitimate"); cf. Kahan, *supra* note 145, at 389–90 (arguing that protecting criminal defendants' rights has a similar effect on civilians, thus increasing crime rates).

<sup>153</sup> Kahan, *supra* note 145, at 379.

<sup>154</sup> See, e.g., Perrin et al., *supra* note 9, at 681, 732.

<sup>155</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (also characterizing the exclusionary rule as "exact[ing] a heavy toll").

<sup>156</sup> *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); see also *id.* at 595 & 599 (describing exclusion as a "get-out-of-jail-free card," an "incongruent remedy," and a "massive remedy").

<sup>157</sup> *United States v. Leon*, 468 U.S. 897, 918 (1984).

<sup>158</sup> *Davis*, 131 S. Ct. at 2426 (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

<sup>159</sup> *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (quoting *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 364–65 (1998)) (internal quotation marks omitted).

<sup>160</sup> *Davis*, 131 S. Ct. at 2427 (quoting *Hudson*, 547 U.S. at 596).

<sup>161</sup> *Id.* at 2426 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)) (internal quotation marks omitted).

“meaningful[ ],”<sup>162</sup> as opposed to “marginal” or “incremental”<sup>163</sup>—law enforcement is sent a clear message that the Court is not whole-heartedly committed to the exclusionary remedy. This language does not express condemnation in the unambiguous way necessary to influence behavior or social norms.

Under any of the three theories of deterrence described in this Article, then, it is debatable whether police culpability should play a role in the deterrence analysis.<sup>164</sup> The link between culpability and deterrence is weakest under the organizational account, and the question is closer under the rational choice and expressive theories. More generally, determining how the exclusionary rule can most effectively deter Fourth Amendment violations is largely a matter of guesswork. But the *Leon* line of cases, by relying on inconsistent deterrence arguments and introducing an element of culpability into the mix so as to eliminate any sanction for negligent violations, has hindered the difficult task of structuring a meaningful deterrent.

Until this point, the Article has taken the Court at its word that the exclusionary rule is aimed solely at deterrence. The next part of the Article pushes back and moves from asking how we expect to deter unreasonable searches to why we want to do so.

#### IV. THE POVERTY OF DETERRENCE

In light of the indeterminacy that surrounds the mechanics of deterrence, evaluating how the exclusionary rule can best prevent constitutional violations might be facilitated by understanding why the Court thinks deterrence is a worthy aim. To say, as the Court has repeatedly stated, that the exclusionary rule’s singular purpose is to “deter future Fourth Amendment violations” is technically incomplete.<sup>165</sup> Deterrence is not a self-defining principle on its own: there has to be an underlying reason why society is interested in discouraging certain behavior. Thus, for the Court to maintain that the exclusionary rule’s sole goal is deterrence is “[c]onceptually . . . question-begging” absent a discussion of why the Justices consider it important to encourage police compliance with the Fourth Amendment.<sup>166</sup>

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<sup>162</sup> *Herring*, 129 S. Ct. at 702; see also *Davis*, 131 S. Ct. at 2427 (“[r]eal deterrent value”); *Herring*, 129 S. Ct. at 704 (“substantial” deterrence).

<sup>163</sup> *Herring*, 129 S. Ct. at 700 (quoting *Scott*, 524 U.S. at 368; *Illinois v. Krull*, 480 U.S. 340, 352 (1987)) (internal quotation marks omitted).

<sup>164</sup> The theories are confirmed by empirical reports recounting the impact that abolishing the exclusionary sanction has had in particular cases. See, e.g., *Davies*, *supra* note 5, at 1306–07 (citing federal law enforcement’s intentional manipulation of Fourth Amendment standing rules); *Gray*, *supra* note 35, at 45 n.188 (describing the pre-*Mapp* experience in California); *Sklansky*, *supra* note 6, at 580–81 (reporting that “[w]ithout the remedy of the exclusionary rule, the [California] rule [prohibiting warrantless garbage searches] has evaporated” and state police are actually “now trained to ignore it”); cf. Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 132–40 (1998) (discussing police training programs in California that specifically instructed officers on the “question-first” technique of deliberately circumventing *Miranda*, which the Court eventually struck down in *Missouri v. Seibert*, 542 U.S. 600 (2004)).

<sup>165</sup> *Davis*, 131 S. Ct. at 2426.

<sup>166</sup> *Kahan*, *supra* note 68, at 416.

The answer to this question might seem self-evident, and in some sense it is. The contemporary Court does not deny that an unconstitutional search is a violation of a criminal defendant's personal rights,<sup>167</sup> and it sees the exclusionary rule as "removing the incentive" to inflict similar wrongs in the future.<sup>168</sup> But from here the narrative becomes a bit tricky. While acknowledging the invasion of constitutional rights occasioned by an unreasonable search, the Court has severed the suppression remedy from that right, calling the substantive Fourth Amendment question a "separate" issue from the remedial one.<sup>169</sup> Thus, in *Leon* the Court observed that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'"<sup>170</sup> *Leon* went on to explicitly reject the concept of the exclusionary remedy as "a personal constitutional right of the party aggrieved,"<sup>171</sup> and the Court has repeated that sentiment, bluntly stating in *Herring* that "the exclusionary rule is not an individual right."<sup>172</sup>

Given the Court's reluctance in other contexts to assume that constitutional lightning will strike twice in the same place,<sup>173</sup> its concern with discouraging Fourth Amendment violations presumably refers to unreasonable searches that will be inflicted on

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<sup>167</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (noting that the exclusionary rule cannot "cure the invasion of the defendant's rights which he has already suffered" (emphasis added) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)) (internal quotation marks omitted)); *id.* at 919 (referring to unconstitutional searches as "conduct which has deprived the defendant of some right" (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), and *United States v. Peltier*, 422 U.S. 531, 539 (1975)) (internal quotation marks omitted)).

<sup>168</sup> *United States v. Calandra*, 414 U.S. 338, 347 (1974) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (internal quotation marks omitted).

<sup>169</sup> *Leon*, 468 U.S. at 906 ("Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983))); see also *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006) (quoting the same language).

<sup>170</sup> *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354).

<sup>171</sup> *Id.* (quoting *Calandra*, 414 U.S. at 348) (internal quotation marks omitted).

<sup>172</sup> *Herring v. United States*, 129 S. Ct. 695, 700 (2009); see also *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) ("Exclusion is 'not a personal constitutional right.'" (quoting *Stone*, 428 U.S. at 486)). This has not always been the Court's view. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (referring to the exclusionary rule as "an essential part of the right to privacy" and the Fourth Amendment's "most important constitutional privilege").

<sup>173</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (finding that the victim of an unconstitutional chokehold did not have standing to bring an injunction action challenging the city's chokehold policy because he could not demonstrate "a real and immediate threat that he would again be stopped for . . . any . . . offense, by an officer . . . who would illegally choke him"); *O'Shea v. Littleton*, 414 U.S. 488, 495–97 (1974) (likewise precluding an injunction suit brought by a class of plaintiffs on the grounds that "[p]ast exposure" to discriminatory practices by the criminal justice system did not show a likelihood of "future injury" because the Court assumed the plaintiffs would "conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct").

other individuals and not the defendant herself. Thus, rather than vindicating her own rights, a defendant who files a motion to suppress is protecting the rights of third parties under the Court's deterrence-driven version of the exclusionary rule. As Professor Heffernan has observed, this vision of the exclusionary rule as exclusively a "third-party remedy" with "no roots in the wrong a defendant has suffered" distinguishes it from other *ex post* remedies, which also tend to be "reparative" in nature.<sup>174</sup> He analogizes the exclusionary rule to punitive damages,<sup>175</sup> but even they are different from the current Court's treatment of the exclusionary rule in that they serve the added function of imposing punishment.<sup>176</sup>

Similarly, deterrence is a familiar concept in other areas of the law, but it is not expected to do all the work on its own. Deterrence is a common feature of criminal law and torts, as well as constitutional torts, but it is not their exclusive purpose. When courts are able to balance deterrent interests with other priorities, it becomes less necessary to resolve speculative questions about deterrence in fashioning an appropriate remedy.

Thus, for example, the law of torts aims to encourage us to refrain from causing injuries to others,<sup>177</sup> or, to borrow from law and economics, to internalize social costs so as to reduce those injuries to an efficient level.<sup>178</sup> In addition to deterrence, however, tort law is also designed to compensate injured victims, to assign the costs of injury to the most appropriate party.<sup>179</sup> Built on a tort model, constitutional tort suits likewise have the twin goals of deterring future constitutional violations and compensating victims for the loss of their rights.<sup>180</sup>

Criminal law is usually seen as serving even broader deterrent aims, to discourage not only conduct that injures other people, but also acts that society deems wrongful

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<sup>174</sup> Heffernan, *supra* note 11, at 800, 801, 825; *see also* Laurin, *supra* note 55, at 704 (noting that, in the Court's view, the exclusionary rule is "fundamentally systemic" rather than "a 'personal' remedy").

<sup>175</sup> *See* Heffernan, *supra* note 11, at 808; *cf.* *Smith v. Wade*, 461 U.S. 30, 52 (1983) (noting that "a key feature of punitive damages [is] that they are never awarded as of right, no matter how egregious the defendant's conduct").

<sup>176</sup> *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (citing as the purposes of punitive damages "to punish the defendant for his willful or malicious conduct and to deter others from similar behavior"); *Wade*, 461 U.S. at 54 ("Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979))).

<sup>177</sup> *See, e.g., Keeton et al., supra* note 33, at 25–26.

<sup>178</sup> *See, e.g., William M. Landes & Richard A. Posner, The Economic Structure of Tort Law* 6–8 (1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

<sup>179</sup> *See, e.g., Keeton et al., supra* note 33, at 20, 24–25.

<sup>180</sup> *See, e.g., Stachura*, 477 U.S. at 307; *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Carey v. Piphus*, 435 U.S. 247, 255–57 (1978); *see also supra* note 120 and accompanying text (discussing the link the Court has drawn between the good-faith exception and the qualified immunity defense available to police officers in constitutional tort litigation).



even if they do not directly harm others.<sup>181</sup> In addition, all but the most die-hard utilitarians view criminal law as assessing blame for culpable conduct, even where there is no hope of affecting future behavior.<sup>182</sup>

The exclusionary rule was not always such an outlier. Before the Court became fixated on deterrence, it too relied on additional policy rationales to justify exclusion. In its landmark ruling in *Mapp v. Ohio*,<sup>183</sup> for example, the Court did refer to the exclusionary remedy as a “deterrent safeguard,” but its clear emphasis was elsewhere.<sup>184</sup> Thus, the current Justices’ predecessors envisioned the exclusionary rule as necessary to remedy constitutional violations, to prevent the Fourth Amendment from becoming “a form of words” or “an empty promise.”<sup>185</sup> They also cited “the imperative of judicial integrity,” viewing the admission of illegally seized evidence as tainting the courts and judicial process.<sup>186</sup> Finally, they relied on the principle that government should obey its own laws, channeling Justice Brandeis’s warning that “[i]f the Government becomes a lawbreaker, it breeds contempt for law.”<sup>187</sup> Pairing the deterrent function

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<sup>181</sup> See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 10–12 (1988) (listing as possible additional targets of criminal prohibition conduct that poses a risk of harm to others, injures the public or the state, causes offense, hurts the actor herself, or is considered immoral). *But see* JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) (arguing that criminal law’s only valid purpose is “to prevent harm to others”).

<sup>182</sup> See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104–88 (1997).

<sup>183</sup> 367 U.S. 643 (1961).

<sup>184</sup> *Id.* at 648; see also *id.* at 656 (noting that “the purpose of the exclusionary rule ‘is to deter’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))). *But cf.* Heffernan, *supra* note 11, at 818 (reading *Mapp* as giving a “ringing endorsement of exclusion as a deterrent remedy”).

<sup>185</sup> *Mapp*, 367 U.S. at 655, 660 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)); see also *id.* at 652 (citing “[t]he obvious futility of . . . other remedies”); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (noting that without exclusion the Fourth Amendment would be “of no value, and . . . might as well be stricken from the Constitution”).

<sup>186</sup> *Mapp*, 367 U.S. at 659 (quoting *Elkins*, 364 U.S. at 222); see also *Weeks*, 232 U.S. at 392 (“The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . .”); cf. Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 149 (2012) (relying on three experimental studies in advocating “reinvigorating the integrity justification” for the exclusionary rule); Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 49 (2010) (criticizing the Court for having “forgotten the importance of judicial integrity to the enforcement of constitutional rights”).

<sup>187</sup> *Mapp*, 367 U.S. at 659 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967)); see also *id.* (“Nothing can destroy a government more quickly than its failure to observe its own laws . . .”). See generally Gray, *supra* note 35, at 18–40 (tracing the history of the Court’s reliance on different rationales for exclusion); Heffernan, *supra* note 11, at 808–27 (same).

with any of these other justifications for exclusion diminishes the need to rely on empirically speculative notions of deterrence in structuring the exclusionary remedy. Although there is some sentiment today among a minority of Justices to resurrect some of these other justifications,<sup>188</sup> the majority seems committed to deterrence and now either ignores or rejects outright those alternative rationales for suppression.<sup>189</sup>

Moreover, the contemporary Court's "myopic" focus on deterrence seemingly forecloses the analogy to the compensatory and punishment aims of torts and criminal law.<sup>190</sup> For example, the Court has consistently denied that compensation is a purpose of the exclusionary rule, noting in *Leon* that "[t]he wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'"<sup>191</sup> Although damages are similarly incapable of curing the injury inflicted in many tort and constitutional tort cases, the Court has reiterated that view, most recently commenting in *Davis v. United States* that suppression is not "designed to 'redress the injury' occasioned by an unconstitutional search" and is "unsupportable as reparation or compensatory dispensation to the injured criminal."<sup>192</sup>

Likewise, the Supreme Court's emphasis on deterrence is hard to reconcile with the position that exclusion serves criminal law's retributive goal of punishing or assessing blame.<sup>193</sup> Although terms like "sanction" and "penalty" appear in the Court's

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<sup>188</sup> See *Herring v. United States*, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (endorsing "a more majestic conception" of the exclusionary rule (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)) (internal quotation marks omitted)); *Hudson v. Michigan*, 547 U.S. 586, 608–09 (2006) (Breyer, J., dissenting) (citing the rationale that admission of illegally seized evidence "would seriously undermine the Fourth Amendment's promise"). *But cf.* Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as Constitutional Right*, 10 OHIO ST. J. CRIM. L. (forthcoming 2013) (arguing that "there are no articulate proponents on the current Court who embrace *Weeks's* view that the [exclusionary] rule is constitutionally based").

<sup>189</sup> See, e.g., *Hudson*, 547 U.S. at 598–99 (citing civil liability, "the increasing professionalism" of the police, police disciplinary procedures, and civilian review as "extant deterrents"); *United States v. Leon*, 468 U.S. 897, 921 n.22 (1984) (discounting the judicial integrity rationale on the grounds that, *inter alia*, it "is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose" (quoting *United States v. Janis*, 428 U.S. 433, 459 n.35 (1976)) (internal quotation marks omitted)); *id.* at 908 (arguing that "[i]ndiscriminate application of the exclusionary rule . . . may well 'generat[e] disrespect for the law and administration of justice'" (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976))).

<sup>190</sup> *Davies & Scanlon*, *supra* note 6, at 1051.

<sup>191</sup> *Leon*, 468 U.S. at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

<sup>192</sup> *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (quoting *Stone*, 428 U.S. at 486; *Janis*, 428 U.S. at 454 n.29).

<sup>193</sup> See *Leon*, 468 U.S. at 953 (Brennan, J., dissenting) ("[T]he rule is not designed to be, nor should it be thought of as, a form of 'punishment' of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment."); Alschuler, *supra* note 7, at 512

descriptions of the exclusionary remedy,<sup>194</sup> they could simply be loose synonyms or shorthand references for exclusionary “rule” or “remedy” rather than signals that the Court considers exclusion a form of individualized punishment. After all, the retributive concepts of condemnation and blaming look backwards at an actor’s culpability, whereas deterrence focuses forward on the prevention of future misconduct.<sup>195</sup>

Nevertheless, the Court’s recent emphasis on police culpability in decisions like *Herring* and *Davis* suggests a closer fit with criminal law’s blaming or retributive function. Writing without the benefit of these opinions, Professor Davies presciently described the exclusionary rule as a sanction aimed at deterring “harmful conduct that is considered wrongful” by imposing “a penalty” along with a “dose of societal condemnation,” as opposed to a “price” designed to “deter only inefficient harms,” which would allow the police to engage in “morally neutral” conduct so long as they were willing to compensate those injured by it.<sup>196</sup> One of her principal rationales for characterizing the exclusionary rule as a sanction was her view that *Leon* makes the exclusionary remedy turn on law enforcement’s culpability.<sup>197</sup> As discussed above, I do not believe that *Leon* alone supports that argument,<sup>198</sup> and Davies acknowledged that “[t]he triumph of the deterrence rationale . . . significantly softened the moralizing message observable in [the Court’s] earlier exclusion decisions.”<sup>199</sup> But the Court’s more recent endorsement of a stronger role for culpability does suggest a model of exclusion as a method of condemning wrongful behavior on the part of the police.<sup>200</sup>

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(noting that the exclusionary rule “is not about disciplining constables by freeing criminals” and in fact “is not about punishment at all”).

<sup>194</sup> See Brooks Holland, *The Exclusionary Rule as Punishment*, 36 RUTGERS L. REC. 38, 41 & nn.32–33 (2009) (citing *Withrow v. Williams*, 507 U.S. 680, 701 (1993); *Leon*, 468 U.S. at 906; *United States v. Payner*, 444 U.S. 727, 733 n.5 (1980); *Janis*, 428 U.S. at 448; *McGautha v. California*, 402 U.S. 183, 211 (1971)).

<sup>195</sup> See Kahan, *supra* note 78, at 601–02 (noting that retributivism is linked to an offender’s “moral culpability,” while deterrence punishes in order to “avert[] future harm” (quoting Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1987))); see also Gray, *supra* note 35, at 52–53 (“In contrast with deterrence-only approaches, retributivism is conceptually married to culpability as a necessary component of desert.”).

<sup>196</sup> Davies, *supra* note 5, at 1277–79; see also Gray, *supra* note 35, at 5–6 (arguing that the Court “justif[ies] the [exclusionary] rule as a form of punishment designed to deter”).

<sup>197</sup> See Davies, *supra* note 5, at 1316–17. Her other two rationales were that unconstitutional methods of obtaining evidence are “considered ‘wrongful’ and thus ‘prohibited’” and that the penalty imposed by the exclusionary rule does not vary depending on the harmfulness of the officer’s misconduct. See *id.* at 1293, 1318–19; cf. Taslitz, *supra* note 36, at 485 (maintaining that *Leon* viewed exclusion “as partly serving the function of condemning the institutional moral culpability of the police”).

<sup>198</sup> See *supra* notes 107–08 and accompanying text.

<sup>199</sup> Davies, *supra* note 5, at 1301.

<sup>200</sup> See Alschuler, *supra* note 7, at 464 (“*Herring* departs from the Court’s historic view of exclusion by treating it as a remedy for police misconduct rather than as a remedy for

And that model tends to move the Court, seemingly unwittingly, away from a singular focus on deterrence.<sup>201</sup>

For somewhat different reasons, the Court's decision in *Hudson* also harkens back to a version of the exclusionary rule that predates *Leon*. In refusing to apply the exclusionary remedy to violations of the knock-and-announce rule, the Court's opinion in *Hudson* relied in part on a novel concept of "attenuation."<sup>202</sup> Specifically, the Court reasoned that exclusion could not "vindicate the interests protected by the knock-and-announce requirement" because that requirement was not intended to "shield[ ] . . . potential evidence from the government's eyes."<sup>203</sup> This rationale is reminiscent of the pre-deterrence vision of the exclusionary rule as an individual remedy designed to compensate the defendant for a loss of rights, instead of a future-looking deterrent aimed at protecting third parties.<sup>204</sup>

Thus, both the focus on culpability in *Herring* and *Davis*, and the attenuation reasoning in *Hudson*, tend to undermine the deterrence-driven view of the exclusionary rule and resurrect the Court's earlier alternative justifications for the rule. Placing these other policies back on the table can help inform the structuring of the remedy, its scope and limitations, and alleviate the need to rely exclusively on the inherently speculative questions surrounding deterrence. This is not to say that assessing the type of sanction necessary to further these other goals will never lead to controversy. Certainly, measurement issues can arise in determining what remedy is appropriate to compensate, and especially to condemn, as well as to protect constitutional rights, preserve judicial integrity, and generate respect for the law. But considering these other interests along with the goal of deterring Fourth Amendment violations provides some welcome content to deterrence. Moreover, in the context of motions to suppress, the remedial task is facilitated by the fact that exclusion has an either-or quality to it and does not call for precise and variable quantification.

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unreasonable searches." *But cf.* Laurin, *supra* note 55, at 730–31 & n.307 (agreeing that *Herring* makes "highly individuated fault assessments," but observing that the Court could be doing so in order to deter or to punish (emphasis omitted)).

<sup>201</sup> See Gray, *supra* note 35, at 31–35 (tying the Court's earlier justifications for the exclusionary rule to retributivism).

<sup>202</sup> *Hudson v. Michigan*, 547 U.S. 586, 593 (2006).

<sup>203</sup> *Id.*

<sup>204</sup> See Alschuler, *supra* note 6, at 1764 (pointing out that *Hudson*'s attenuation reasoning was contrary to the Court's "denigrat[ion] [of] 'rights' theories of the rule"); Gray, *supra* note 35, at 69 (noting that "vindicat[ion] . . . has no footing in a remedial scheme based on deterrence" but "does resonate with a personal remedy"); Laurin, *supra* note 55, at 716 (observing that attenuation is suggestive of "a rights-based understanding" of the exclusionary rule rather than "a wholly instrumental approach"); Maclin & Rader, *supra* note 8, at 1227 n.209 (finding it "incredible that Justice Scalia was unaware of the inconsistency between the conclusion that exclusion is not a personal right and his newly announced theory in *Hudson*"); Tomkovicz, *supra* note 6, at 1869–70 (describing *Hudson* as "rooted in the long-rejected notion that the exclusionary rule is present oriented, designed to provide reparation for the person injured").

## CONCLUSION

The resurfacing of long forgotten justifications for the exclusionary rule in some of the Supreme Court's recent Fourth Amendment opinions is surely unintentional, for a solid majority of the Justices seem committed to the view that deterrence is the sole purpose of exclusion. But without these alternative rationales for the exclusionary remedy, or some explanation why the Court thinks it important for the exclusionary rule to exercise this deterrent function, deterrence simpliciter is an empty vessel devoid of independent content. A cynic might be tempted to hypothesize that the impoverished nature of deterrence, combined with its inherently speculative empirical quality, makes it an easily manipulated doctrine and therefore attractive to a Court eager to cut back on the reach of the Fourth Amendment and willing to turn to the deterrence flavor of the week in order to do so.

Even if we take the Court at its word and evaluate the good-faith opinions with only deterrence in mind, the recent introduction of police culpability into the equation does not find clear support in deterrence theory, whether rational choice theory, organizational theory, or expressivist theory. Until the Court is willing to treat the exclusionary rule like other remedies and balance the deterrent function with additional priorities, it is left to fashion an exclusionary remedy relying exclusively on the empirically unanswerable questions surrounding deterrence. Even assuming the Court retains its single-minded focus on deterrence, however, hopefully it will at least retreat from the decision in *Herring* and *Davis* to place law enforcement culpability front and center stage in the deterrence calculus by requiring more than negligence to trigger the exclusionary rule.