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## The Exclusionary Rule Lottery Revisited

Eugene Milhizer

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# THE EXCLUSIONARY RULE LOTTERY REVISITED

*Eugene Milhizer*<sup>+</sup>

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## I. INTRODUCTION

In 2008, I had the honor of authoring *The Exclusionary Rule Lottery*.<sup>1</sup> In that article, I posited that the present understanding and application of the Fourth Amendment exclusionary rule—a court-made rule imposed for the sole purpose of deterring future police misconduct—is morally objectionable, practically unwise, and, therefore, in need of radical reconsideration or abandonment.<sup>2</sup> I argued that in its current form, the exclusionary rule raises serious jurisprudential concerns, rests on a bare utilitarian premise, and employs a simplistic approach that is ill-suited to accomplish its fundamental purpose. I sought to expose some of these deficiencies through the device of a hypothetical “suppression lottery,” which was intended to be both absurd and provocative.<sup>3</sup>

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<sup>+</sup> President, Dean, and Professor of Law, Ave Maria School of Law. I would like to thank my colleagues, Professor Mark Bonner and Dean Patrick Quirk, for their insightful comments and enthusiastic encouragement. I would also like to thank Mr. Austin Hepworth for his valuable contributions as my research assistant.

1. Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755 (2008).

2. *Id.* at 755.

3. *Id.* at 762. In my earlier article, the suppression lottery was described as follows: Suppose it has been determined that suppression is needed in only 75% of the cases involving illegal searches and seizures to achieve the desired quantum of deterrence. After a judicial determination that the search or seizure was illegal, the defendant would be invited to participate in a suppression lottery. Perhaps a large contraption could be wheeled out to the front of the courtroom, with 75% of the ping-pong balls inside having the word “SUPPRESS” and the remaining 25% having the word “ADMIT” written on them. The balls could then be set in motion by blowing air, and the defendant could flip a switch so that a ball is randomly selected that would determine his fate.

Based on the response the article has generated, as well as the feedback that I have received, I conclude that my intent to induce discussion has been successfully accomplished. The article, which has been reprinted in another publication,<sup>4</sup> has been downloaded hundreds of times,<sup>5</sup> and has prompted a wide range of reactions. Some of the more thoughtful responses disagree with the conclusions expressed or contend that the article inadequately addressed certain relevant matters. A few specific critiques that were brought to my attention claim that the article mischaracterized the Court's present conception and application of the exclusionary rule, failed to address how the rule could be revised to deter police misconduct with greater utility, underappreciated the rule's noble purposes and benefits, and inadequately recognized the rule's critical role in preserving judicial integrity and respect for the legal system. These contentions deserve a reasoned response, and that is the purpose of this Article.

## II. WHAT IS THE PURPOSE OF THE EXCLUSIONARY RULE AS IT IS CURRENTLY APPLIED?

The justifications and theories offered in support of the exclusionary rule have been many and varied<sup>6</sup> and have provoked considerable controversy and

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*Id.* To be clear, this was intended as *reductio ad absurdum*.

4. Eugene Milhizer, *The Exclusionary Rule Lottery*, 36 SEARCH & SEIZURE L. REP. 1 (2009).

5. As of February 4, 2010, there have been 376 full-text downloads of the article since it was posted on February 4, 2008. Past and current readership totals are on file with the author.

6. The term "exclusionary rule" is an imprecise term that encompasses several different exclusionary rules and theories based on the type and nature of the governmental misconduct at issue and the rights thereby transgressed. For example, confessions obtained in violation of *Miranda* protections and those that are coerced in a traditional sense, such as those obtained by torture or threats, have their own distinct exclusionary rules. Compare *Miranda v. Arizona*, 384 U.S. 436, 444–45, 478–79 (1966) (mandating that if proper warnings of a suspect's right to silence and an attorney are not given, confessions and other statements must be excluded), with *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding that coercion by the police may render a confession involuntary and thus inadmissible as a violation of the Due Process Clause), and *Spano v. New York*, 360 U.S. 315, 321–23 (1959) (applying a much more fact-dependent inquiry based on many factors when deciding whether a confession must be excluded because of coercion and threats). Evidence obtained via illegal searches that are so egregious as to "shock the conscience" is excluded under this third standard. See *Rochin v. California*, 342 U.S. 165, 172–74 (1952). Additional rules exclude evidence under the Sixth Amendment. See, e.g., *United States v. Henry*, 447 U.S. 264, 272–74 (1980) (holding that incriminating statements made to a government informant violated the defendant's Sixth Amendment right to counsel); *Brewer v. Williams*, 430 U.S. 387, 400–01 (1977) (finding that the detective's statements were "tantamount to interrogation" and thus violated defendant's Sixth Amendment rights). Other constitutional violations, such as violations of the Fourteenth Amendment, may result in the exclusion of evidence. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 294–98 (1967) (finding that some pretrial identifications can be excluded under the Due Process Clause of the Fourteenth Amendment). Statutory transgressions have also given rise to exclusionary rules. See generally George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 63–82 (1989) (discussing exclusionary rules in nonconstitutional circumstances). As most often used,

debate.<sup>7</sup> In *The Exclusionary Rule Lottery*, I argued that these issues involving the rule have now been clearly settled by the United States Supreme Court through its decisional authority.<sup>8</sup> According to the Court, the contemporary reductionist Fourth Amendment exclusionary rule is a judicially created mechanism, designed with the sole purpose of deterring future police misconduct by excluding from trial evidence obtained through unconstitutional searches and seizures.<sup>9</sup> In briefly tracing the exclusionary rule's tortured history, I began by observing that the rule was originally established for a grander purpose: to vindicate the rights of individuals and to protect the integrity of the criminal-justice system. When the Supreme Court minted the rule in 1914, it instructed that exclusion was essential to the Fourth Amendment's protection against unreasonable searches and seizures.<sup>10</sup> The Court later elaborated that the rule was of constitutional dimension,<sup>11</sup> observing that without such a rule the Fourth Amendment would be reduced to a mere "form of words,"<sup>12</sup> amounting to little more than a right without a

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however, the term "exclusionary rule" pertains to the exclusion of evidence obtained directly or derivatively from illegal searches and seizures in violation of the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383, 398 (1914). This is the version of the exclusionary rule that was addressed in my earlier article, and it is the version that will be revisited here.

It might also be noted that the exclusionary rule is not so much a rule as it is a description of a particular type of discretionary decision-making. See generally WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* 126–27 (2d ed. 1982) (discussing the attributes and characteristics of rules in general). Its status as a rule connotes a greater sense of authority, formality, and precision than may otherwise be deserved.

7. See generally Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 597–604, 621–27 (1983) [hereinafter Kamisar, *Principled Basis*] (discussing the many theories that have been offered concerning the purpose of the exclusionary rule); 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, 1380–86 (1983) (discussing a number of theories supporting an exclusionary rule).

8. Milhizer, *supra* note 1, at 755–57.

9. *Weeks*, 232 U.S. at 398 (excluding from criminal trials evidence that is obtained as a direct result of an illegal search or seizure by police in violation of the Fourth Amendment). The rule also excludes any subsequently seized evidence the discovery of which resulted from the initial illegality. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (discussing the "fruit of the poisonous tree" doctrine).

10. *Weeks*, 232 U.S. at 398. A unanimous Court in *Weeks* emphasized the obligation of federal courts and officers to give effect to Fourth Amendment guarantees, suggesting that the violation itself was an invasion of an individual's right of personal security, personal liberty, and private property. *Id.* Accordingly, the original warrantless search and the trial court's later refusal to return the materials violated Weeks's constitutional rights. *Id.* *Weeks* was the first criminal case in which the rule was enumerated and applied; however, the rule can be traced to *Boyd v. United States*, in which the Court discussed the origins and principles of exclusion in the context of a civil forfeiture case. 116 U.S. 616, 629–30 (1886).

11. *Mapp v. Ohio*, 367 U.S. 643, 648, 657 (1961).

12. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

remedy.<sup>13</sup> The Court's lofty justification for exclusion was perhaps most direly expressed by Justice Louis Brandeis, who wrote that "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."<sup>14</sup> Justice Brandeis further warned that "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."<sup>15</sup>

As I explained in my earlier article, the rule's source and purpose thereafter underwent a radical transformation. Subsequent Supreme Court decisions justifying exclusion have placed increasing emphasis on deterring police misconduct,<sup>16</sup> resulting in this instrumental benefit becoming the rule's only viable justification.<sup>17</sup> During this same period, the Court—in what can only be described as a blinding flash of self-awareness—discovered that the rule was created under the Court's own rulemaking auspices rather than being constitutionally compelled.<sup>18</sup> By the mid-1970s, the exclusionary rule, which was born a constitutional imperative resting on a noble and expansive rationale,<sup>19</sup> had been reduced to "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."<sup>20</sup> Thus, exclusion was no longer a right of the victim of an illegal search or seizure; instead, it was a blunt and unsophisticated mechanism for curbing police misconduct that occasionally resulted in the release of guilty—and sometimes dangerous—criminals into society if, as then-Judge Benjamin Cardozo famously put it, "the constable ha[d] blundered."<sup>21</sup>

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13. See *Weeks*, 232 U.S. at 398 (determining that without the exclusionary rule, "the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution").

14. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (noting the importance of the government setting a proper example for its citizens by adhering to principles of "decency, security, and liberty").

15. *Id.*

16. See *Mapp*, 367 U.S. at 656 (describing the Supreme Court's recent acknowledgement of the purpose of the exclusionary rule as one of deterring police misconduct).

17. See *Stone v. Powell*, 428 U.S. 465, 485 (1976) (instructing that the judicial integrity justification for exclusion has only a "limited role [to play] . . . in the determination [of] whether to apply the [exclusionary] rule in a particular context"); *United States v. Janis*, 428 U.S. 433, 446 (1976) (explaining that deterrence of police misconduct is the "'prime purpose' of the rule, if not the sole one" (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974))).

18. *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (noting that the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands").

19. See *supra* note 10 and accompanying text.

20. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) ("[T]he [exclusionary] rule is prudential rather than constitutionally mandated . . ."); *Calandra*, 414 U.S. at 347–48.

21. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

According to the Court's reasoning, because police are "engaged in the often competitive enterprise of ferreting out crime,"<sup>22</sup> the exclusion of illegally gathered evidence would restrain egregious ferreting, ensuring that police stay within constitutional bounds.<sup>23</sup> The conventional argument in favor of a contemporary rule is two-fold, with aspects of both specific and general deterrence. With respect to specific deterrence, the particular officer responsible for the misconduct "would be likely to feel aggrieved if her efforts were thwarted by exclusion and that exclusion would accordingly induce her to take greater care in the future."<sup>24</sup> From a general deterrence perspective, the repeated and systematic suppression of evidence would promote greater professionalism among law enforcement authorities and improve police practices as a whole.<sup>25</sup> The general deterrence theory is supported by a belief that is widely understood but largely unstated: if the community-at-large is repeatedly made to suffer the consequences of police misconduct through the repatriation of evildoers who avoid conviction and punishment solely because of police misconduct, then the community's reaction of fear and outrage would act as a deterrent and lead to reform.<sup>26</sup> Viewed in this light, the exclusionary rule amounts to little more than a dressed-up version of behavior modification.<sup>27</sup>

The Court's version of the exclusionary rule is thus instrumental, utilitarian, and blunt. It is instrumental insofar as the exclusion of evidence is not beneficial for its own sake, compelled by the Constitution, or motivated by some lofty purpose, such as preserving the integrity of the judicial process by ensuring that evidence used at trial was properly obtained; rather, exclusion is

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22. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

23. *See Elkins v. United States*, 364 U.S. 206, 217 (1960) (holding that the exclusionary rule's purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

24. ANDREW L.-T. CHOO, *ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS* 96 (1993).

25. *See Stone v. Powell*, 428 U.S. 465, 492 (1976); CHOO, *supra* note 24, at 96–97.

26. *Cf.* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* § 20.04[D][2][a], at 380 (4th ed. 2006) (observing that when a "murderer goes free . . . [because evidence is suppressed] people are *less* secure in their persons, houses, papers, and effects").

27. *See generally* B.F. SKINNER, *ABOUT BEHAVIORISM* 46 (1974) (describing the effectiveness of positive and negative reinforcement used in the operant conditioning process). Behavior modification replaces undesirable behaviors with more desirable ones through positive or negative reinforcement. *Id.* B.F. Skinner, the psychologist who is widely credited with founding behaviorism, made important contributions to the theory and principles of behavior modification. Dr. C. George Boeree, *B.F. Skinner, PERSONALITY THEORIES* (2006), available at <http://webspaceship.edu/cgboer/skinner.html>. The reference to behavior modification in connection with the exclusionary rule should be self-evident: constitutional police behavior is positively reinforced with the introduction at criminal trials of evidence gathered, and unconstitutional police behavior is negatively reinforced through the suppression at criminal trials of evidence gathered. *See supra* notes 22–26 and accompanying text.

simply a means to achieving an end: the deterrence of future police misconduct.<sup>28</sup> A deterrence-based justification subsumes any notions that judicial integrity is a rationale for the exclusionary rule.<sup>29</sup> In other words, the costs of exclusion are not suffered to “enable[e] the judiciary to avoid the taint of partnership in official lawlessness.”<sup>30</sup> Instead, they are resignedly endured because exclusion is deemed to be the only effective remedy<sup>31</sup> at the judiciary’s disposal<sup>32</sup> to address police misconduct.

The rule is utilitarian in that it is justified on the basis of choosing the lesser of two harmful outcomes: (1) allowing police misconduct to continue unchecked by the courts or (2) undermining the truth-seeking purpose of a criminal trial and permitting some guilty and even dangerous persons to go free through the exclusion of evidence obtained unconstitutionally.<sup>33</sup> Indeed,

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28. See *supra* notes 16–20 and accompanying text; see also *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (determining that the purpose of the exclusionary rule is to deter wrongful police conduct).

29. See *United States v. Calandra*, 414 U.S. 338, 347–48 (1974) (holding that evidence is suppressed via the exclusionary rule only when the deterrent value of suppression is efficacious).

30. *Id.* at 357 (Brennan, J., dissenting).

31. It has repeatedly been argued that the exclusionary rule is the only effective means for deterring police misconduct. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 652 (1961) (addressing “[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (describing the exclusionary rule as “the primary instrument for enforcing the [F]ourth [A]mendment”); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 951 (1965) (“The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.”); Stewart, *supra* note 7, at 1386–89 (arguing that criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are especially unavailing, and suggesting that civil liability will not lie for “the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice”).

32. *United States v. Janis*, 428 U.S. 433, 445–46 (1976) (noting that a court’s ability to invoke the exclusionary rule is part of its “supervisory power over the administration of criminal justice” (quoting *Elkins v. United States*, 364 U.S. 206, 216 (1960))). There is a related belief expressed by courts that the authority rests with the judiciary, as a matter of constitutional design, to curb police excesses via judge-ordered exclusion. See, e.g., *Evans*, 514 U.S. at 18 (Stevens, J., dissenting) (finding that the Fourth Amendment’s protections are “a constraint on the power of the sovereign, not merely on some of its agents”). For an especially evocative expression of the constitutional basis for exclusion premised on a separation-of-powers justification, see *State v. Novembrino*, 519 A.2d 820, 856 (N.J. 1987) (“In our view, the citizen’s right to be free from unreasonable searches and seizures conducted without probable cause is just such a fundamental principle, to be preserved and protected with vigilance. In our tripartite system of separate governmental powers, the primary responsibility for its preservation is that of the judiciary.” (emphasis added)).

33. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998) (“[T]he rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application . . . .”); see *United States v. Payner*, 447 U.S. 727, 734 (1980) (acknowledging “that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case”); *United States v. Havens*, 446 U.S. 620, 627

the exclusionary rule obtains its deterrent force from the fact that exclusion is an evil that is suffered by both the offending officer and the larger community. The police are established, organized, trained, and empowered to prevent crime, apprehend wrongdoers, and obtain evidence. They engage in these activities to protect society and maintain order. However, the release of wrongdoers resulting from the suppression of evidence obtained by police misconduct both frustrates the police and harms the common good. When police execute their law-enforcement responsibilities through unconstitutional means, society is likewise harmed because privacy is diminished, liberty is restrained, and property rights are compromised. As a consequence of police misconduct, individuals will suffer and the community will be less secure. The exclusionary rule disincentivizes police misconduct by suppressing its fruits at a criminal trial regardless of their reliability and probity. Suppression is judged to be less damaging even though it may undermine the truth-seeking purpose of the judicial process and allow the guilty to remain unaccountable and go free. Viewed in this light, the exclusionary rule expresses a policy determination based on a cost-benefit analysis, which is thinly cloaked with a constitutional gloss and a judicial imprimatur.

The rule is blunt in its application insofar as it is automatic and largely categorical,<sup>34</sup> rather than nuanced in principle or tailored in application.<sup>35</sup> In assessing the harm resulting from suppression, the Court fails to consider the following factors: the seriousness of the crime or the future threat posed by the criminal;<sup>36</sup> the value of the evidence at issue;<sup>37</sup> the effectiveness of other

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(1980) (holding that the minimal deterrent effect of forbidding impeachment of a defendant who testifies falsely during proper cross-examination is outweighed by “the resulting impairment of the integrity of the factfinding goals of the criminal trial”).

34. I use the term “largely categorical” because several non-discretionary exceptions to the exclusionary rule have been recognized. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 924 (1984) (recognizing a good-faith exception to the exclusionary rule, which considers only “objective good faith”); *New York v. Quarles*, 467 U.S. 649, 651 (1984) (recognizing a public-safety exception to the exclusionary rule); *Nix v. Williams*, 467 U.S. 431, 448 (1984) (recognizing an inevitable-discovery exception to the exclusionary rule).

35. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 419–20 (1971) (Burger, C.J., dissenting) (criticizing the exclusionary rule because it does not draw rational distinctions between dissimilar cases and “characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement”).

36. *Compare James Duke Cameron & Richard Lustiger, The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 142 (1984) (arguing in favor of a balancing approach weighing the gravity of the police misconduct against the gravity of the crime committed), and *John Kaplan, The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (proposing the abandonment of exclusionary rules in certain “serious cases,” such as murder and kidnapping), with *Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11–30 (1987) [hereinafter *Kamisar, Comparative Reprehensibility*] (evaluating the proposition that the seriousness of the crime should be considered when determining whether to apply the exclusionary rule).

37. *Stone v. Powell*, 428 U.S. 465, 490 (1976) (acknowledging that “the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the



methods of deterrence;<sup>38</sup> the fact that the rule promotes cynicism<sup>39</sup> and perjury;<sup>40</sup> or the integrity of the justice system, both real and perceived.<sup>41</sup> Furthermore, whether the officer was a first-time transgressor or recidivist,<sup>42</sup> whether the officer was pursuing a desire to achieve justice or his own self-interest, the officer's motives (with some narrow exceptions),<sup>43</sup> and the egregiousness of the police misconduct (again, with only a few exceptions)<sup>44</sup> do not factor into the Court's determinations. Nothing matters except the imperative of deterring largely undifferentiated police misconduct at the expense of largely undifferentiated social costs.<sup>45</sup>

Some critiques of my earlier article contended that it overstated the importance of deterrence as a rationale for the exclusionary rule. They argue that the rule is of constitutional dimension and that its purposes are manifold and even noble. Although this understanding of the rule may be appealing to

guilt or innocence of the defendant").

38. See, e.g., Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-48 (1994) (contending that although exclusion has serious flaws, the "exclusionary rule is . . . the best we can realistically do").

39. See 1 DRESSLER & MICHAELS, *supra* note 26, § 20.04[D][2][b], at 381-83 (noting that to "[t]he public . . . the sight of guilty people going free because reliable evidence that could convict them is suppressed by judges on the basis of a technicality" is repulsive (internal quotation marks omitted)).

40. See WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 38-39 (1999) (explaining that the exclusionary rule promotes untruthful police testimony (so-called "testilying") and helps create "[a]n attitude of cynicism [that] starts to pervade courthouses as the criminal justice system comes to expect and tolerate dishonesty under oath").

41. See *supra* notes 28-32 and accompanying text.

42. See Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 SETON HALL CONST. L.J. 859, 865 (1997) (noting that the exclusionary rule is not "tailor[ed] . . . [to the officer's] 'offense history'"); see also David G. Gale, Note, *United States v. Ozar: The Eighth Circuit Gives the FBI a Key*, 29 CREIGHTON L. REV. 1279, 1293 n.138 (1996) (stating that the rule does not address previous harms to the defendant or violations by the officer (citing Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335)); Kamisar, *Comparative Reprehensibility*, *supra* note 36, at 30 (noting that the goal of the exclusionary rule is not to punish past conduct, but to deter future misconduct).

43. William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 365 (1991).

44. Charles Alan Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 744 (1972) (arguing that the exclusionary rule should only apply in cases of "outrageous" police misconduct).

45. See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) ("[W]e have held [the exclusionary rule] to be applicable only where its deterrence [of police misconduct] outweigh[s] its 'substantial social costs.'" (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984))). Proponents of the rule may concede that many, if not all, of the above factors are technically relevant, but they argue that they are substantially outweighed by the imperative of deterring future police misconduct. See, e.g., Steiker, *supra* note 38, at 848-52.

some, it is simply not supported by the Court's decisional authority over the past thirty-plus years.<sup>46</sup>

Any residual doubts about the decisive role of police deterrence as the basis for the exclusionary rule should be put to rest by the decision in *Herring v. United States*, which was decided after the publication of my earlier article.<sup>47</sup> Bennie Herring had traveled to the Sheriff's Department in Coffee County, Alabama, to retrieve items from an impounded pickup truck.<sup>48</sup> Investigator Mark Anderson asked the department's warrant clerk "to check for any outstanding warrants" on Herring.<sup>49</sup> The clerk contacted her counterpart at the neighboring Dale County Sheriff's Department, who informed her that Herring did have an outstanding arrest warrant.<sup>50</sup> Within fifteen minutes, the Dale County clerk advised the Coffee County Sheriff's Department of its clerical mistake, as Herring's warrant had been recalled five months earlier.<sup>51</sup> By that time, however, Herring had been arrested, and firearms and methamphetamines had been discovered in his vehicle.<sup>52</sup>

Herring was charged in the United States District Court for the Middle District of Alabama with felony possession of a firearm<sup>53</sup> and possession of a controlled substance.<sup>54</sup> He moved to suppress the evidence seized from his vehicle, claiming that his arrest, as well as the search of his vehicle, were unlawful because they were based on an invalid warrant.<sup>55</sup> The trial court denied the motion, and Herring was subsequently convicted.<sup>56</sup> The United States Court of Appeals for the Eleventh Circuit affirmed, finding the evidence admissible because the mistake relating to the warrant was made by officers in a different county, was promptly corrected, and did not evidence a recurring problem or pattern of error.<sup>57</sup>

The United States Supreme Court's decision in *Herring* is instructive in several ways.<sup>58</sup> First, it explicitly re-affirms that the sole justification for the

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46. See *supra* notes 28–32 and accompanying text.

47. 129 S. Ct. 695 (2009).

48. *Id.* at 698.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 699; see also 18 U.S.C. § 922(g)(1) (2006).

54. *Herring*, 129 S. Ct. at 699; see also 21 U.S.C. § 844(a) (Supp. 2009).

55. *Herring*, 129 S. Ct. at 699.

56. *Id.* (citing *United States v. Herring*, 451 F. Supp. 2d 1290, 1293 (M.D. Ala. 2005)); see also *United States v. Herring*, 492 F.3d 1212, 1219 (11th Cir. 2007).

57. *Herring*, 492 F.3d at 1218–19. The court of appeals relied heavily on the good-faith exception to the exclusionary rule. *Id.* at 1215–18.

58. One caveat seems in order. *Herring* is a five-to-four decision. *Herring*, 129 S. Ct. at 697. Chief Justice John Roberts wrote the majority opinion, joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. *Id.* Justice Ruth Bader Ginsburg wrote the dissenting opinion, joined by Justices John Paul Stevens, David Souter, and Stephen Breyer.

exclusionary rule is the deterrence of future police misconduct.<sup>59</sup> In *Herring*, the Court explained that “[w]e have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. . . . Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”<sup>60</sup> The Court further stated that

Justice Ginsburg’s dissent [in *Herring*] champions what she describes as “a more majestic conception of . . . the exclusionary rule,” which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.<sup>61</sup>

Second, *Herring* responds to criticism that the exclusionary rule is too blunt and crude by incorporating an evaluation of the police misconduct at issue, which is to say the harm to be deterred.<sup>62</sup> This assessment has two aspects: (1) the nature of the police misconduct and (2) the gravity of the harm.<sup>63</sup>

With regard to the nature of the misconduct, *Herring* suggests that exclusion should be reserved for wrongful conduct that is “flagrant,” “intentional,” or “sufficiently deliberate.”<sup>64</sup> The Court reasoned that this limitation does not detract from the rule’s purpose because “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>65</sup> Police misconduct that does not rise to this level of egregiousness, such as an isolated occurrence or negligent misconduct, apparently does not justify the costs of exclusion according to *Herring*.<sup>66</sup>

With regard to the gravity of the harm, the Court explained that “[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies

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*Id.* Irrespective of the principle of stare decisis, the Court’s approach to the exclusionary rule could change, perhaps even dramatically, with a change in the composition of the Court.

59. *Id.* at 700 (“[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence.” (internal quotation marks omitted)).

60. *Id.* (citations omitted).

61. *Id.* at 700 n.2 (alteration in original) (citations omitted) (internal quotation marks omitted).

62. *Id.* at 701–02 (noting that the egregious nature of the police misconduct is and has been a factor in determining whether the exclusionary rule should be applied).

63. *Id.* (describing precedent in which the Court has discussed the type of police conduct and the severity of the resulting harm in rendering its decision).

64. *Id.* at 702.

65. *Id.*

66. *Id.* at 698, 702 (reasoning that “isolated negligence” and “nonrecurring and attenuated negligence” do not rise to the level of misconduct needed to require suppression of evidence); see Heffernan & Lovely, *supra* note 43, at 317, 338–45 (arguing that most violations of the Fourth Amendment involve a good-faith misunderstanding of the law or misinterpretation of the facts by the police).

with the culpability of the law enforcement conduct.”<sup>67</sup> The police misconduct must be “sufficiently culpable that such deterrence is worth the price paid by the justice system.”<sup>68</sup> Thus, in order for the exclusion of evidence and its consequences to qualify as a lesser evil in the Court’s deterrence calculus, the misconduct to be deterred must be “sufficiently culpable”;<sup>69</sup> otherwise, the benefit of deterring minimally offensive misconduct does not justify the social cost of excluding probative and reliable evidence of guilt.<sup>70</sup>

Although the evaluation of competing harms in *Herring* is perhaps more comprehensive and exacting than any previously undertaken, the Court has, on other occasions, declined to exclude evidence when the illegal search or seizure that produced it did not amount to deliberate police misconduct.<sup>71</sup> In *United States v. Leon*, the Court first recognized the good-faith exception to the exclusionary rule and decided that evidence need not be excluded when the police act in good-faith reliance on a facially valid warrant later found to be invalid.<sup>72</sup> In *Massachusetts v. Sheppard*, the Court held that the good-faith exception applied to a warrant deemed invalid because of the judge’s failure to make “clerical corrections.”<sup>73</sup> In *Illinois v. Krull*, the Court invoked the good-faith exception when the police acted in accordance with a statute that was later declared to be unconstitutional.<sup>74</sup> Finally, in *Arizona v. Evans*, the Court

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67. *Herring*, 129 S. Ct. at 701.

68. *Id.* at 702. The exclusionary rule can be more easily countenanced as the “price paid by the justice system,” suggesting that the only victim of the exclusionary rule is an impersonal, faceless, and monolithic bureaucracy or process. *Id.* (emphasis added). Of course, the justice system—and therefore the common good—suffers when guilty criminals are released without punishment. People also suffer—widows, orphans, rape survivors, molestation victims, drug addicts, and others. Naming the victim as merely the justice system obscures the many real victims of the exclusionary rule and unfairly minimizes its costs.

69. The Court noted a two-part test under which police misconduct has to be both “sufficiently deliberate” and “sufficiently culpable” to justify exclusion. *Id.*

70. *Id.* at 700–02 (discussing the importance of examining the social costs of exclusion).

71. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 274–78 (1978) (noting that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a “*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment,” reasoning that enough deterrence can be provided with this limitation to avoid additional social costs); *Stone v. Powell*, 428 U.S. 465, 493–95 (1976) (holding that the exclusionary rule does not apply in federal habeas corpus proceedings because the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context); *Alderman v. United States*, 394 U.S. 165, 174–76 (1969) (agreeing that Fourth Amendment rights cannot be vicariously asserted). In each of these cases, the advantage of significant deterrence is found to outweigh the burden of suppression, while the benefit of a more attenuated deterrence is found to be insufficient to outweigh these costs.

72. 468 U.S. 897, 922–25 (1984) (finding a good-faith exception applicable to prevent the suppression of evidence obtained in violation of the Fourth Amendment but based on an officer’s objective good-faith belief that he was acting within the scope of the amendment).

73. 468 U.S. 981, 986, 991 (1984).

74. 480 U.S. 340, 349–50 (1987).

applied the good-faith exception when the police obtained mistaken information from a database prepared by a court employee.<sup>75</sup> In each of these cases, the police acted in conformity with, and under the authority of, a facially valid court document or statute, which is precisely the type of conduct that the exclusionary rule seeks to encourage rather than deter.<sup>76</sup> The Court has found that suppression in these circumstances would gratuitously punish the police and would be clearly outweighed by countervailing social costs.<sup>77</sup> According to the Court, means other than the exclusionary rule can be used to ensure that judges, court employees, and legislators are deterred from trampling on Fourth Amendment rights.<sup>78</sup>

Unlike the earlier cases, however, the perpetrators of the Fourth Amendment violation in *Herring* were in fact the police, albeit police from a neighboring county.<sup>79</sup> For the first time, the Court was willing to balance away police misconduct premised on an error originating with the police in applying the good-faith exception to avoid exclusion. While the significance and future impact of the *Herring* decision remain a matter of debate,<sup>80</sup> the case unequivocally reiterates that the deterrence of future police misconduct is the *raison d'être* for the modern exclusionary rule. Even if one approves of *Herring's* attempt to make the exclusionary rule less arbitrary, the fact remains that the Court failed to address in any meaningful or comprehensive way the philosophical and prudential problems associated with an instrumental, utilitarian, and blunt policy initiative created and administered by courts under the guise of a constitutional mandate.

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75. 514 U.S. 1, 15–16 (1995).

76. See *id.* (applying the exception to an illegal seizure effected on account of a computer error); *Krull*, 480 U.S. at 349–50 (applying the exception to an officer's Fourth Amendment violation resulting from reliance on an unconstitutional statute); *Sheppard*, 468 U.S. at 990–91 (applying the exception to an officer's reliance on a warrant with clerical mistakes); *Leon*, 468 U.S. at 922–23 (applying the exception to an invalid warrant that the officer believed to be valid).

77. See *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (holding that the exclusionary rule “[wa]s inapplicable” to evidence obtained after a knock-and-announce violation because the interests violated by the abrupt entry of the police “have nothing to do with the seizure of the evidence”); *United States v. Ramirez*, 523 U.S. 65, 71, 72 n.3 (1998) (instructing that the “destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression” and that if the breaking of the window had been unreasonable, it would have been necessary to determine whether there had been a “sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence”).

78. See *Hudson*, 547 U.S. at 597–99 (discussing the variety of remedies available for a Fourth Amendment violation).

79. See *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

80. Compare Posting of Tom Goldstein to SCOTUSblog, <http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/> (Jan. 14, 2009, 11:32 EST) (describing *Herring* as a “significant shift in the Court’s jurisprudence”), with Posting of Orin Kerr to The Volokh Conspiracy, <http://www.volokh.com/posts/1231961926.shtml> (Jan. 14, 2009, 14:38 EST) (describing *Herring* as a “minor case”).

### III. CAN THE RULE BE IMPROVED BY A MODIFICATION THAT ACCOUNTS FOR THE SERIOUSNESS OF THE CRIME OR THE DANGEROUSNESS OF THE CRIMINAL?

Modification of the present rule to consider, as part of the calculation of whether to suppress evidence, the seriousness of the crime or the future dangerousness of the criminal will adequately realize deterrent benefits while reducing countervailing costs. Those who support such pragmatic reforms could well accept my contention that at present the exclusionary “rule’s bare utilitarian premise and simplistic approach render it morally and prudentially objectionable, and, therefore, in need of radical reconsideration or abandonment.”<sup>81</sup> Presumably, they would also welcome the Court’s efforts in *Herring* to refine the rule to account for the nature and gravity of the police misconduct.<sup>82</sup> However, they would urge an exclusionary calculus that achieves the desired deterrence but reduces exclusion for egregious crimes and thereby achieves greater utility.

The argument to reduce unnecessary or high-cost exclusion based on pragmatic variables is well-worn. Professor Yale Kamisar, although opposing such modifications of the exclusionary rule, has coined the phrase the “comparative reprehensibility approach” to describe an ostensibly more refined equation for evaluating proportional harms in deciding whether to suppress evidence obtained in violation of the Fourth Amendment.<sup>83</sup> Many variations of the comparative reprehensibility approach have been proposed. Professor John Kaplan, for one, would carve out an exception to the exclusionary rule for certain serious offenses.<sup>84</sup> Professor William Plumb would recognize an even broader exception for serious offenses, explaining that

if the application of the [exclusionary] rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth, and if a murderer, bank robber, or kidnapper should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws.<sup>85</sup>

Others prefer a two-tiered approach, exempting certain serious cases from the exclusionary rule while balancing the gravity of the unconstitutional police behavior against the magnitude of the crime to determine whether to exclude

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81. Milhizer, *supra* note 1, at 755.

82. See *supra* notes 64–68 and accompanying text.

83. Kamisar, *Comparative Reprehensibility*, *supra* note 36, at 2 (internal quotation marks omitted).

84. Kaplan, *supra* note 36, at 1046 (contending that the exclusionary rule should not be applied in the case of “treason, espionage, murder, armed robbery and kidnapping by organized groups”).

85. William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939) (citations omitted).

evidence in less serious circumstances.<sup>86</sup> Some who would exempt certain offenses from the exclusionary rule would create an exception to that exemption to account for police misconduct that is so egregious as to “shock the conscience” of the court.<sup>87</sup> Similar proposed refinements of the exclusionary rule include the inadvertence exception,<sup>88</sup> the substantiality test,<sup>89</sup> and the proportionality basis.<sup>90</sup> Consistent with this line of thinking, Australia has adopted a discretionary exclusionary rule, which requires the trial judge to weigh two competing considerations in deciding whether to suppress evidence: “the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.”<sup>91</sup>

The comparative reprehensibility approach and its analogues are sensibly motivated. If the exclusionary rule is designed to obtain benefits while minimizing harm, then it seems fair to evaluate the relative harm caused by suppressing evidence as compared to the damage caused by admitting it. This type of assessment begs the question of which is more harmful to society—the misconduct by the police officer or the criminal activity of the suspect. Leaving aside cases that involve especially abusive police activities that “shock[] the conscience,”<sup>92</sup> and thus might deny due process,<sup>93</sup> the self-evident

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86. Cameron & Lustiger, *supra* note 36, at 142–52.

87. Kaplan, for one, argues that “some police violations would still invoke the exclusionary rule” even in “serious cases” exempted from the exclusionary rule. Kaplan, *supra* note 36, at 1046; *see also* *Rochin v. California*, 342 U.S. 165, 172–73 (1952) (holding that suppression is required when the police misconduct is so egregious as to “shock[] the conscience”).

88. Kaplan, *supra* note 36, at 1044 (“One superficially tempting modification would be to hold the [exclusionary] rule inapplicable where the constitutional violation by the police officer was inadvertent.”). Arguably, this could be the import of the recent *Herring* decision. *See supra* notes 47–80 and accompanying text.

89. Philip S. Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 27 (1975) (discussing the Model Pre-Arrestment Code’s approach wherein a suppression motion is granted only if the court finds that the violation on which it is based was substantial).

90. *See, e.g., Stone v. Powell*, 428 U.S. 465, 490 (1976) (“The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice.”).

91. Craig M. Bradley, *Criminal Procedure in the “Land of Oz”: Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99, 110 (1990) (citation omitted); *see also* Frank Bates, *Improperly Obtained Evidence and Public Policy: An Australian Perspective*, 43 INT’L & COMP. L.Q. 379, 380 (1994) (reiterating the Australian Court’s adoption of a discretionary exclusionary rule); *see generally* Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia*, 29 INT’L & COMP. L.Q. 664 (1980) (comparing and contrasting the discretionary aspects of the exclusionary rule in England, Canada, and Australia).

92. *Rochin*, 342 U.S. at 172.

93. U.S. CONST. amend. XIV. No claim is made that every shocking episode of police misconduct necessarily denies due process. Such a determination would presumably turn, in part,

answer is that the crime is almost always more damaging than the unreasonable search or seizure used to gather the evidence to prosecute it. Additionally, the unpunished criminal is almost always more dangerous to society than the misbehaving and presumably undeterred policeman who gathered evidence of the crime.<sup>94</sup> As Dean John Wigmore put it over eighty years ago, the exclusionary rule places courts “in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.”<sup>95</sup>

However, it is difficult to imagine how any of these proposed refinements to the exclusionary rule—comparative reprehensibility, inadvertence, substantiality, or proportionality—could ever be incorporated into a deterrence-based exclusionary rule. As I explained in my earlier article:

[T]he decision whether to suppress could not be made before the merits of the suppression issue are litigated. To do so beforehand would be premature; as the exclusion of probative evidence could not be ordered unless and until it can be premised on a judicial finding that the police conduct was unconstitutional. Likewise, it appears obvious that the suppression decision would have to be made randomly or based on criteria unknown to the police at the time when they are participating in a search or seizure. If the ultimate suppression decision was made in relation to factors known by the police before they act—such as the seriousness or [*sic*] the crime or the dangerousness of the suspect—the same assumptions that underlie the exclusionary rule could prompt the police to adjust their conduct and risk the possible exclusion of evidence because of the urgent need to apprehend a particularly dangerous offender. This would undermine the goal of police deterrence that the rule seeks to achieve.<sup>96</sup>

Professor Craig Bradley agrees that although a mandatory and categorical rule is not necessary for deterrence in an abstract sense, it is required to achieve meaningful deterrence as a practical matter.<sup>97</sup> Bradley explained that

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on one’s tolerance for or expectation of police excess, at least in the absence of a judicial standard for classifying constitutionally based degrees of conscious-shocking behavior.

94. See generally *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (noting how the application of the exclusionary rule can result in letting the guilty go free to live among society). To be clear, this observation is simply a critique of the Court’s exclusionary rule on its own terms.

95. John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922); see also Edward L. Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CAL. L. REV. 565, 582 (1955) (arguing that “put to the choice between permitting the consummation of the defendant’s illegal scheme and the policeman’s illegal scheme, the court must of necessity favor the defendant”).

96. Milhizer, *supra* note 1, at 762.

97. Bradley, *supra* note 91, at 123, 135.



[i]f the police *knew* that the evidence would be excluded, for example, two-thirds of the time, they would likely be just as deterred from illegal searches as they are now. The trouble with this approach is that it has to be random. Otherwise, whatever the standards, the police will learn them and adjust their conduct accordingly.<sup>98</sup>

There is another fundamental problem with the comparative reprehensibility approach, at least in its unadulterated form. As noted above, the reprehensibility of criminals and their crimes almost always exceeds that of the police officers and their misconduct.<sup>99</sup> Accordingly, when these competing evils are balanced against each other in individual cases, the expected outcome will be that the illegally obtained evidence will be admitted. A presumptive default to receive such evidence would inevitably nullify any deterrent benefit that the exclusionary rule might otherwise achieve. The resulting symbolic but impotent exclusionary rule would do more than merely defeat the rule's justifying purpose of deterrence; it would undermine possible legislative initiatives, as well as executive actions and reforms, which could address police misconduct in more effective and less costly ways.

The conclusion is inescapable: comprehensive and efficacious revision of a deterrence-based exclusionary rule for the pragmatic purpose of maximizing utility by assessing the comparative harm of admitting versus suppressing evidence is doomed to fail. The rule's very design of influencing future police misconduct through the deliberate avoidance of the risk of exclusion is necessarily undermined if the police can calibrate their behavior to circumvent this risk while deciding whether to engage in misconduct. The only possible means of reducing the amount of suppressed evidence while retaining a comparable deterrent benefit would involve random decision-making by the courts, such as the straw-man lottery I described in my earlier article.<sup>100</sup> Of course, any indiscriminate process for making suppression determinations would be rejected based on its lack of principles, among other reasons. Further, an approach that bases the suppression decision on a systematic comparison of the proportional reprehensibility of criminal and police misconduct would result, for all practical purposes, in an exclusionary rule in name alone. Accordingly, the present deterrence-based exclusionary rule, as bad as it is, cannot be effectively reformed to incorporate a proportionality-of-the-harm analysis.

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98. *Id.* at 123.

99. *See supra* note 94 and accompanying text.

100. Milhizer, *supra* note 1, at 762.

#### IV. WOULD INCORPORATING THE MORE NOBLE ASPIRATIONS OF THE RULE JUSTIFY ITS CONTINUED USE?

Given the insurmountable problems with reforming a narrow, deterrence-based exclusionary rule to obtain greater utility, the next logical question is whether a more encompassing rule might be crafted to account for the ostensibly noble benefits of excluding illegally obtained evidence. Some critics of my earlier article argue that in failing to address these aspects of the exclusionary rule, I failed to consider its full “majesty.”<sup>101</sup> An analysis of these lofty rationales for the rule was deliberately placed beyond the scope of the earlier article, given the reality that these considerations have been rendered virtually irrelevant by the Court’s modern jurisprudence. As noted earlier, those who argue in favor of the noble and majestic exclusionary rule contend that in some general sense, the systematic suppression of unconstitutionally obtained evidence helps preserve the integrity and efficacy of the justice system.<sup>102</sup> Many of these proponents recite the considerations expressed in Justice Brandeis’s dissent in *Olmstead v. United States*, which describes a more expansive rationale for excluding evidence obtained as a result of police misconduct.<sup>103</sup> Brandeis asserted that without an exclusionary rule, illegally obtained evidence would be admitted and would “breed[] contempt for [the] law,” “invite[] anarchy,” and “bring terrible retribution.”<sup>104</sup> Justice Brandeis argued that these reasons justify the suppression of reliable and probative evidence. He concluded that to tolerate receiving illegally obtained evidence at a criminal trial would be to endorse the proposition that “the end justifies the means.”<sup>105</sup>

Before addressing the specific evils Justice Brandeis recited, it is useful to confront his overarching critique that the “end[s] justify the means.”<sup>106</sup> Stripped of its rhetorical flourishes, the truth is that Brandeis’s justification for

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101. For the proposition that the exclusionary rule is majestic, see *Herring v. United States*, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (describing “a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule” (internal quotation marks omitted)).

102. See *supra* notes 11–15 and accompanying text.

103. See *Olmstead v. United States*, 277 U.S. 438, 478–85 (1928) (Brandeis, J., dissenting). Brandeis’s dissent in *Olmstead* is widely recognized as effectively capturing and expressing the nobler justifications for the exclusionary rule. See generally Carol S. Steiker, *Brandeis in Olmstead: “Our Government is the Potent, the Omnipresent Teacher,”* 79 MISS. L.J. 149 *passim* (2009) (discussing Brandeis’s *Olmstead* dissent and its “greatness”). It is also frequently cited. A Westlaw search within the “All State and Federal Cases” and “All Law Reviews, Texts, and Bar Journals” databases reflects that his dissent was cited 2759 times as of August 24, 2009. By way of comparison, a similar search of Justice Stewart’s concurrence in *Jacobellis v. Ohio*, in which he famously observed, when referring to pornography, that “I know it when I see it,” reflects that it was cited only about half as often, 1383 times, as of August 4, 2009. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

104. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

105. *Id.*

106. *Id.*

the exclusionary rule rests on a similar ends-means relationship to that which he so enthusiastically criticized in defending the rule. Justice Brandeis sought a more expansive utilitarian end than the current deterrence-based exclusionary rule, albeit using the same utilitarian means.<sup>107</sup> The present Supreme Court jurisprudence supports the suppression of unconstitutionally obtained evidence (the means) in order to deter future police misconduct (the end).<sup>108</sup> Justice Brandeis, on the other hand, supported the suppression of unconstitutionally obtained evidence (the same means) in order to achieve different ends—enhanced respect for the law, the promotion of good order in society, and avoidance of retribution.<sup>109</sup> The Court's goal of deterring police misconduct could be combined with Justice Brandeis's presumably nobler ends to formulate a more comprehensive utilitarian approach for determining whether to suppress evidence. This would calibrate how much exclusion (the means) is necessary to achieve all of the combined ends, majestic or otherwise; arguably, this is what the Court did years ago in *Mapp v. Ohio*.<sup>110</sup> Any championing of Justice Brandeis's reasoning because it advocates a nobler means (as opposed to nobler ends) is thus fundamentally misguided. Justice Brandeis's admonition about the evils of eliminating the exclusionary rule was simply a call for a more robust set of variables to be evaluated when fashioning a more encompassing, utilitarian-based exclusionary rule.

But it is even worse. Justice Brandeis's justification of the exclusionary rule rests on the same type of bad means/good ends instrumentalism that he is so willing to attribute to his opponents. According to Justice Brandeis, to allow the admission of tainted evidence (bad means) to secure the conviction of a guilty person (good ends) would endorse a form of corrupt instrumentalism.<sup>111</sup> His alternative—that we should suffer by having dangerous criminals go free (bad means) in order to coerce police into behaving lawfully (good ends)—embraces the identical moral infirmity that he condemns.<sup>112</sup> The exclusionary rule, as defended by Justice Brandeis, is every bit as accepting of the proposition that good ends can justify bad means.<sup>113</sup>

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107. See *infra* text accompanying notes 108–09.

108. See *supra* note 9 and accompanying text.

109. *Olmstead*, 277 U.S. at 484–85 (Brandeis, J., dissenting).

110. 367 U.S. 643, 656–57 (1961). *Mapp* identified several justifications for the exclusionary rule, including that it is “an essential part of the right to privacy” and is necessary “to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Id.* at 656. *Mapp* explained that exclusion protects “the imperative of judicial integrity.” *Id.* at 659. It further argued that exclusion achieves symmetry and avoids conflict between federal and state practice. *Id.* at 657–58. Finally, *Mapp* concluded that privacy should be treated like all other constitutional rights, which includes the exclusion of the products of its violation and that, all in all, exclusion makes “common sense.” *Id.* at 656–57.

111. See *supra* notes 103–05 and accompanying text.

112. See *Olmstead*, 277 U.S. at 484–85 (Brandeis, J., dissenting).

113. In his dissent in *Olmstead*, Justice Brandeis also referred to a “private criminal.” *Id.* at 485. The import of this term, however, remains unclear. There is little that is private about a

One other point is worth making before addressing Justice Brandeis's specific arguments. Any critique of his contentions, just as with the contentions themselves, must be highly speculative. As Professor Kamisar put it, the exclusionary rule involves "measuring imponderables and comparing incommensurables."<sup>114</sup> Indeed, it is both frustrating and ironic that while the present conception of the exclusionary rule is ostensibly based on empirical criteria, courts and commentators have been woefully incapable of citing persuasive data to support or contest the idea that suppression meaningfully promotes deterrence or can achieve grander ends. Some have lamented that "there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule."<sup>115</sup> The dearth of empirical evidence suggests several uncomfortable conclusions. First, many of the factual assumptions underlying the exclusion analysis do not easily lend themselves to statistical evaluation and study.<sup>116</sup> Second, many of the values exclusion implicates cannot be measured empirically, because they are essentially unquantifiable moral questions.<sup>117</sup> Third, the Court is not especially concerned about the factual basis for its policy pronouncement.<sup>118</sup> Finally, courts are particularly incapable of engaging in the type of empirical fact-finding used in policy-making; such fact-finding should be reserved for the elected branches of government on account of their greater competence, resources, and political authority.<sup>119</sup>

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criminal who has, by his crime, harmed and offended the general public and, often times, identifiable members of the public, such as the victim and his family.

114. Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551, 613 (1984) [hereinafter Kamisar, *Probable Cause*].

115. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740, 763-64 (1975); see also Stone v. Powell, 428 U.S. 465, 492 & n.32 (1976) (acknowledging the past "absence of supportive empirical evidence" for the exclusionary rule and describing recent empirical studies of the exclusionary rule as "inconclusive").

116. Even Justice William Brennan, an outspoken supporter of the exclusionary rule, acknowledged that "the language of deterrence and of cost/benefit analysis . . . can have a narcotic effect. It creates an illusion of technical precision and ineluctability." *United States v. Leon*, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

117. See Kamisar, *Probable Cause*, *supra* note 114, at 613 (showing the futility in attempting to weigh the competing interests of the exclusionary rule against each other).

118. See *Stone*, 428 U.S. at 492 (noting a lack of empirical evidence to support the premise that the exclusionary rule deters police misconduct).

119. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (indicating that Congress is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems"); *Oregon v. Mitchell*, 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part) (acknowledging that "[t]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions"); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 575 (1994) (recognizing that "[c]ourts are supposed to use moderation in reviewing decisions of the lawmaking body in order to avoid engaging in policymaking, because determining policy . . . is not a function allocated to the judicial branch,"

The speculative nature of any deterrent impact of excluding evidence is exacerbated by the way in which the suppression decision is made. Each time the suppression of evidence is upheld by a divided court, the police officers involved (assuming they become aware of the decision) may be inclined to believe that the judges or justices who agreed with them were correct in concluding that the law had not been violated. These officers are as likely to consider the suppression ruling as just one more vagary of law enforcement as they are to agree with the majority's opinion. Further, before a motion to suppress is litigated, a law-enforcement agency and a prosecutor have reviewed the matter and have decided that no constitutional violation has occurred. If the judge thereafter suppresses the evidence, the police might be inclined to conclude that the judge simply got it wrong, rather than feel chastened to modify their behavior.<sup>120</sup>

With these limitations in mind, we can now turn to Justice Brandeis's first contention that the admission of illegally obtained evidence would "breed[] contempt for [the] law."<sup>121</sup> The argument seems premised on the following syllogism: Permitting the reception of evidence at trial indicates that the court encourages or condones the methods used to obtain the evidence. A court should not encourage or condone illegal police conduct. Therefore, the court should not admit illegally obtained evidence. Further, because the courts are rightfully viewed by society as guardians of justice and the law, a court's willingness to receive illegally obtained evidence would undermine society's confidence in the law.

The argument is superficially attractive. The Court has instructed that "[a] rul[e] admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."<sup>122</sup> It is thus

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particularly when the judge is appointed and not elected (citation omitted)); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971) (stating that the legislature is a better fact-finding institution than the courts for making laws because the legislature has greater familiarity with "current social and economic conditions"); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323 (1987) (noting that "[p]olitically responsive officials are in a better position" to evaluate facts and policies for lawmaking purposes, and therefore courts should "abstain and defer to the legislature" to fulfill that role).

120. In my earlier article, I listed several other reasons for doubting that the exclusionary rule has a meaningful deterrent impact. Milhizer, *supra* note 1, at 763-64 (noting that the officer's misconduct is most often "unintended and lack[ing] malice," that "the sanction of exclusion is [usually] too remote and attenuated" to actually deter, that often the most egregious cases are not dealt with judicially because of plea bargains, that police "may lie [about their actions] to avoid suppression," that suppression occurs long after the misconduct and may not even be brought to the attention of the offending officer, and that the intent of the offending officer may be unable to be thwarted by suppression (citations omitted)).

121. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

122. *Terry v. Ohio*, 392 U.S. 1, 13 (1968). This premise, of course, is not universally true. For example, evidence of child abuse admitted in divorce cases is often obtained through

argued that the exclusionary rule serves the important purpose of “enabling the judiciary to avoid the taint of partnership in official lawlessness,” and that it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior . . . .”<sup>123</sup> Professor Kamisar concurs that a principal reason for the exclusionary rule is to ensure that “the Court’s aid . . . [is] denied in order to maintain respect for law [and] to preserve the judicial process from contamination.”<sup>124</sup>

Ideally, courts would dispense perfect justice in pristine circumstances. Unfortunately, the real world is not so tidy, and to reach an optimal cost-benefit calculus, one must realistically consider how much contempt is engendered for the law and the courts when dangerous criminals are released without punishment simply because the police engaged in misconduct while gathering reliable, probative, and relevant evidence. Imagine how much more contemptible society finds the law when a criminal freed under the auspices of the exclusionary rule commits serious offenses again, and the public subsequently learns that he was released based on what many would consider a legal technicality.<sup>125</sup> It is fair to ask which would breed more contempt for the law: (1) the status quo approach of freeing guilty and perhaps dangerous criminals without punishment for the sole purpose of deterring future police misconduct, or (2) an alternative approach that instead punishes the guilty no matter how the police obtained the evidence, even if doing so results in diminished deterrence of future police misconduct.

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disreputable means, such as aggressive self-help, private investigators, bribery, and hypnosis. *See, e.g.*, *Borawick v. Shay*, 68 F.3d 597, 598, 600 (2d Cir. 1995) (discussing the use of hypnosis in child abuse cases); *Lourdes K. v. Gregory Q.*, No. S-96-016, 1997 WL 256681, at \*3 (Ohio Ct. App. May 16, 1997) (referencing a mother bribing her son to say things against his father in interviews to determine whether abuse occurred); *S.V. v. R.V.*, 933 S.W.2d 1, 8–13 (Tex. 1996) (discussing repressed memory and other forms of evidence in divorce cases); *In re A.R.*, 236 S.W.3d 460, 465–68 (Tex. App. 2007) (describing a mother’s overzealous and failed attempts to win custody by proving child abuse through doctor visits, investigators, home videos, and other means). *But see* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 758–59 (1998) (discussing how evidence of child abuse submitted by a mother often is not believed by the court). This does not suggest that the court, by admitting such evidence, approves of the methods used to gather it, and it certainly does not prevent the appropriate authorities from addressing the underlying misconduct as appropriate.

123. *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

124. Kamisar, *Principled Basis*, *supra* note 7, at 604 (alteration in original) (internal quotation marks omitted).

125. It is this so-called “sporting view” of the criminal-justice system—that even a guilty defendant ought to have a sporting chance at an acquittal—that contributes to the public perception that evidence is suppressed because of legal technicalities. As Professor Joseph Grano put it, although the spectacle of a closely contested trial on an even playing field “makes for good sports, . . . in a criminal investigation we should be seeking truth rather than entertainment.” Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 677 (1986).

It also seems true that society would find it contemptible that the particular officers who engage in misconduct, especially egregious misconduct, routinely go unpunished in part due to the existence of the exclusionary rule. It would seem even more contemptible that as a substitute for punishing these officers, the law has instead decided to prospectively deter them and others from engaging in future misconduct by suppressing the evidence they have gathered at the suspect's trial. Whatever contempt society may feel toward the law because a court admitted illegally obtained evidence at a trial would be largely mitigated if, along with punishing the guilty, the miscreant officers were also made to pay for their misconduct and those who were victims of the police misconduct were compensated accordingly. Most would view this result—the guilty defendant being convicted and sentenced, the misbehaving officer being punished or sanctioned, and the victims being compensated—as a better resolution than could ever be realized through the exclusionary rule. Such an outcome achieves justice for the criminal, the police, the victim, and society, which would thereby promote respect for the law and for the courts that administer it.

Second, Justice Brandeis suggested that the admission of illegally obtained evidence would “invite[] anarchy.”<sup>126</sup> Setting aside the rhetorical hyperbole, one might be tempted to respond simply that society has managed to remain relatively anarchy-free for its first 130 years without the therapeutic influence of the exclusionary rule. It is highly doubtful that any blame for civil unrest occurring before the exclusionary rule was imposed in 1914,<sup>127</sup> such as the Civil War, can be attributed to the absence of such a rule. Likewise, the broader application of the exclusionary rule to state trials in the early 1960s<sup>128</sup> did not prevent widespread urban riots, anti-war protests, and segregation protests later in the decade.<sup>129</sup>

Furthermore, if Justice Brandeis was suggesting that the police would accumulate unchecked power in the absence of the exclusionary rule, history teaches that such a concentration of authority by the state will lead to totalitarianism and oppression rather than anarchy.<sup>130</sup> Likewise, if Justice

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126. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

127. *Weeks v. United States*, 232 U.S. 383, 391–94 (1914) (imposing an exclusionary rule for the first time).

128. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to state trials).

129. See generally Tom C. Clark, *Criminal Justice in America*, 46 TEX. L. REV. 742 (1968) (discussing increasing crime and race riots in the 1960s); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968) (discussing civil rights and civil disobedience, including war protests, in the 1960s).

130. See, e.g., Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409, 410 (2008) (explaining “constitutionalism, which is defined as a system of fundamental laws, rights, and principles limiting governmental power in order to avoid the abuses stemming from unchecked authority”). Assume Justice Brandeis was instead suggesting that the admission of illegally obtained evidence would breed so much contempt and

Brandeis was concerned that without the constraints of the exclusionary rule, the police would run amok and indiscriminately trample the rights of citizens, he places too little faith in the corrective effects of the democratic principles and structures that are integral to American law and society.<sup>131</sup> Law-enforcement authorities operate under the control of the executive branch of the government. When the police act so egregiously as to incur public rancor, voters and taxpayers can seek recompense from the executive authorities through the elective process and lawsuits; political leaders' knowledge of this risk therefore motivates them to constrain police excesses.<sup>132</sup>

Many fundamental reforms in law-enforcement policies and practices were instituted during the latter half of the twentieth century.<sup>133</sup> Police departments are now more professional and respectful of constitutional rights than they were in Justice Brandeis's day.<sup>134</sup> Intra-departmental discipline of officers who engage in misconduct, in addition to recourse to civil suits against offending police officials, appears more effective than in the past.<sup>135</sup> Even if

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disrespect for the law that members of society would become motivated not to follow it. This result could hardly be called "anarchy," as most people would nonetheless obey the law, perhaps even more scrupulously, out of fear of the power of the police. This type of popular response to actual and potential police aggressiveness can be seen as another form of deterrence-motivated behavior. The simple truth is that as long as the police aggressively search and seize to enforce the law, fear of the police will promote obedience, rather than disobedience. Although this state of affairs may tilt even excessively toward totalitarianism, it hardly risks anarchy.

131. See Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 *FORDHAM L. REV.* 1665, 1670 (2009) (discussing the corrective nature of the "American democratic tradition" across all legal and social institutions).

132. See Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 *GEO. MASON U. CIV. RTS. L.J.* 479, 498–99 (2009) (explaining how citizens have used tort law and other means of citizen oversight to help curb police misconduct).

133. See, e.g., ROBERT FOGELSON, *BIG CITY POLICE* 3–4 (1977) (discussing police reform during the twentieth century); WILBUR MILLER, *COPS AND BOBBIES* 150–51 (2d ed. 1999) (same); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 31–49 (1977) (same); Walker & Macdonald, *supra* note 132, at 498–99 (discussing the history of police misconduct and past reforms, as well as recent reforms that have helped make police agencies self-monitoring and self-adaptive).

134. *Developments in the Law—Confessions*, 79 *HARV. L. REV.* 935, 939–40 (1966) (contending that police misconduct only occurs in "extraordinary cases, having no relation to the ordinary day-to-day operations of a police department"). As one dissenting Justice in *Miranda* asserted, in the context of obtaining confessions, "the examples of police brutality mentioned by the Court [in the majority opinion] are rare exceptions to the thousands of cases that appear every year in the law reports." *Miranda v. Arizona*, 384 U.S. 436, 499–500 (1966) (Clark, J., dissenting) (citation omitted).

135. See Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 *HASTINGS CONST. L.Q.* 45, 47 (1987) (proposing the decertification of police officers who violate the Fourth Amendment). See generally Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. ILL. L. REV.* 363, 384–85 (discussing civil suits and, although finding them inadequate in their current form to address police misconduct, suggesting that they could be superior to the exclusionary rule).



the exclusionary rule played some role in the reform movement, it is highly doubtful that the police would revert to nineteenth-century hooliganism if the rule were repealed today. Moreover, that a causal relationship between suppression and deterrence does exist, it is likely that the importance of deterring police misconduct via suppression would vary between police departments and jurisdictions depending on a variety of factors, including the degree to which reforms have been successfully internalized. It is doubtful that one size fits all, yet the Supreme Court paints with a universal brush when it announces and imposes its Court-made exclusionary rule.<sup>136</sup>

Even conceding that some minute level of anarchy might be risked if the exclusionary rule were someday repealed, it seems apparent that an even greater risk of anarchy is presently assumed by the rule's largely indiscriminate application. All things considered, it is far more disruptive to the fabric of society to release some guilty, and perhaps recidivist, offenders because of the categorical application of the exclusionary rule than it would be to fail to deter some future police misconduct because of the absence of the exclusionary rule.

Third, Justice Brandeis argued that the admission of illegally obtained evidence would "bring terrible retribution."<sup>137</sup> This concern is misplaced. Properly understood, retribution is the central and indispensable basis for criminal punishment.<sup>138</sup> According to retributive principles, one ought to receive the punishment he deserves,<sup>139</sup> and such punishment benefits the individual punished as well as the common good.<sup>140</sup> Other legitimate bases for punishment, such as deterrence<sup>141</sup> and rehabilitation,<sup>142</sup> are subsidiary to

136. See Friendly, *supra* note 31, at 954 (noting that when the Supreme Court announces a rule of criminal procedure, it inevitably stifles local decision-making and ingenuity).

137. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

138. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 194–98 (W. Hastie trans., 1887) (explaining that punishment can be imposed only because the individual on whom it is inflicted has committed a crime); C.S. LEWIS, *The Humanitarian Theory of Punishment, in GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 287, 288 (Walter Hooper ed., 1970) (explaining that punishment cannot be removed from "the concept of Desert").

139. LEWIS, *supra* note 138, at 288 (arguing that the justness of a sentence depends on whether or not it is deserved); Michael S. Moore, *The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179, 179–82 (Ferdinand Schoeman ed., 1987) (explaining that punishment is justified only because offenders deserve it).

140. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1891–92 (1991) (discussing the benefits of retributive punishment).

141. See generally Eugene R. Milhizer, *Reflections on the Catholic Bishops' Statement About Deterrence*, 99 SOC. JUST. REP. 69 (2008) (discussing the various aspects of deterrence, as well as the legitimacy of deterrence as a basis for criminal punishment).

142. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53 (1968) (describing rehabilitation as "[t]he most immediately appealing justification for punishment").

retribution.<sup>143</sup> Viewed in this light, retribution cannot be “terrible,” as Brandeis described it.<sup>144</sup>

Perhaps Justice Brandeis was warning about the possibility of vengeance rather than retribution, expressing the belief that without the constraints on police conduct provided by the exclusionary rule, private citizens would be more likely to take the law into their own hands and dispense subjective justice.<sup>145</sup> Any such concern that the exclusionary rule will provoke “terrible vengeance” likewise cannot withstand scrutiny. As a matter of simple logic, vengeance is sought by those who have been wronged—or by others in their stead—against those who have perpetrated the wrong. Assuming that police misconduct would run rampant in the absence of the exclusionary rule, any resulting vengeance would be directed toward the police by those whose rights were violated by the police. Alternatively, assuming some guilty people go unpunished as a consequence of the present exclusionary rule, any resulting vengeance would most likely be directed toward these guilty people by those whom they had victimized. It is also possible that some “terrible vengeance” could be directed toward the government officials who apply the exclusionary rule and thereby release dangerous criminals. It seems obvious that a systematic application of the exclusionary rule is far more likely to provoke “terrible vengeance” by victims upon their wrongdoers than the repeal of the rule is to incite “terrible vengeance” by a concerned public upon miscreant

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143. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03(B)(1), at 16–19 (discussing the forms of retributivism); LEWIS, *supra* note 138, at 288 (arguing that focusing solely on deterrence “remove[s] [the criminal] from the sphere of justice”); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 630–31 (2009) (explaining that all adequate theories of punishment must derive from the principles of retribution); Massaro, *supra* note 140, at 1891–92 (noting that retribution is the favored justification for punishment because it provides for punishment in more situations than deterrence- and rehabilitation-based rationales); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) (articulating the basis for punishment under a retributive theory).

144. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

145. Vengeance is usually associated with anger by one who is wronged and with a desire to make the wrongdoer suffer for no reason other than to attempt to heal the pain of the wronged, whereas retribution is usually associated with seeking a just punishment for conduct that is morally culpable. See Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT’L L. & POL’Y 189, 194–95 (2009) (discussing how retribution is aimed at giving wrongdoers “the punishment they deserve”); Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 490–91 (2009) (discussing vengeance and explaining that it stems from emotional pain and anger). There are some, however, who contend—incorrectly in my judgment—that there is no distinction between retribution and vengeance. Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 526 (2009) (noting that Justice Thurgood Marshall believed that retribution, retaliation, and vengeance were one in the same).

law-enforcement officials or the courts.<sup>146</sup> In the aggregate, the exclusionary rule seems to encourage, rather than discourage, vigilantism.<sup>147</sup>

In my earlier article, I described at length why the exclusionary rule could not be justified as it is presently understood—as a deterrent to future police misconduct.<sup>148</sup> It likewise cannot be justified, even using the more encompassing and ostensibly nobler set of utilitarian considerations espoused by Justice Brandeis and others, for the reasons just discussed. Using either instrumental approach—the Court’s deterrence-based rule or Justice Brandeis’s more expansive rule—the exclusion of reliable, probative, and relevant evidence of guilt is simply too costly when measured against the benefits it seeks to achieve.

#### V. IS THE RULE NEEDED TO PRESERVE JUDICIAL INTEGRITY?

Some courts and commentators argue that regardless of its utilitarian efficacy, the exclusionary rule is essential to preserve and protect the integrity of the criminal-justice system.<sup>149</sup> I will refer to this as the value-based justification for exclusion. Proponents of this justification assert that the integrity of the judicial process would be seriously undermined if the courts habitually received evidence obtained by the police in violation of the Fourth Amendment.<sup>150</sup> Before squarely addressing the validity of this contention, it is instructive to examine the premise on which it rests: an exaggerated and even romanticized view of the criminal-justice system.

Criminal trials are human endeavors that are characteristically marked by a rough-and-tumble confrontation between a prosecutor and a defense attorney, each committed to achieving opposing results.<sup>151</sup> Trials are conducted in a

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146. See 1 DRESSLER & MICHAELS, *supra* note 26, § 20.04[D][2][b], at 381–83 (noting that the public finds the consequences of the exclusionary rule to be repulsive).

147. Imagine the popular response if a killer who had terrorized a community for days or weeks was released because evidence of his guilt was excluded via the exclusionary rule. There is little doubt that residents would turn to self-help measures to protect themselves, their families, and their property, as the “rule of law” had failed to protect them. Thus, as it currently operates, the exclusionary rule could help provoke vigilantism, as people might begin to feel that the law is impotent and their only effective option is self-obtained justice. This concern is present among some abused women who have unsuccessfully sought legal protection from their abusers. If the abuser returns to the streets or the victim’s home unpunished, the victim may resort to killing the abuser because she has lost faith that the police will protect her. See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 256–57 (2008) (discussing the emotions and reactions of battered women).

148. See generally Milhizer, *supra* note 1 (analyzing the present justification for the exclusionary rule and arguing that this justification does not fit the rule).

149. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (discussing judicial integrity as one of the rationales for the exclusionary rule).

150. See *id.* (discussing the dangers that occur when the government fails to follow its own laws).

151. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009) (addressing the requirement that claims brought by counsel have merit); MODEL RULES OF PROF’L CONDUCT R. 3.8 (2009)

charged environment where the stakes are high—conviction, financial punishment, confinement, and, on rare occasions, even death. They ordinarily involve real victims who have suffered greatly and are seeking justice and closure. In some cases, even the community feels directly victimized or takes a special interest in a trial. Public safety from recidivism is also often at stake.

As with all human endeavors, criminal trials are imperfect. The law recognizes this reality and tolerates imperfection without undermining the legitimacy of a trial by setting aside verdicts only when errors of a certain magnitude occur. For example, in some circumstances, if the judge is unwise or errs but does not abuse his discretion or commit plain error, a guilty verdict will stand.<sup>152</sup> Additionally, Federal Rule of Evidence 403 provides: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>153</sup> In other words, under Rule 403, a criminal trial must tolerate the admission of evidence resulting in unfair prejudice, confusion of the issues, and misleading of the jury, provided that these adverse consequences are not too weighty. On other occasions, although an error by a judge may be deemed egregious, a conviction and punishment will not be reversed if the error is ultimately determined to be non-prejudicial.<sup>154</sup>

Bear in mind that each of the examples just discussed involves errors by the trial judge; thus, they are proximate and integral to the courtroom, as contrasted with police misconduct, which is far more remote or attenuated. However, none of the evidentiary and appellate rules or standards cited above, even to most proponents of the value-based justification for the exclusionary rule, serves to undermine the integrity or legitimacy of the criminal-justice system. These proponents know that to insist on a perfect trial is to require the unobtainable.

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(discussing the responsibilities of the prosecutor). While defense counsel should never fabricate a story, he should forcefully advocate that the prosecutor prove every element of the crime. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009); *see also* *Scott v. Hughes*, 483 N.Y.S.2d 18 (App. Div. 1984) (illustrating the competitiveness of trials by finding that the defense counsel's actions were “merely reflective of the intensity of the competitiveness of the trial and the zealotry of counsel”).

152. *See* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997) (holding that the court of appeals erred in overturning the district court's decision because the court of appeals applied a stricter standard than was required); *see also* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243–44 (2009) (explaining how appellate courts use the abuse of discretion standard to review a trial judge's mistakes and how the standard allows for errors of a certain magnitude).

153. FED. R. EVID. 403.

154. *See* *United States v. Olano*, 507 U.S. 725, 734 (1993) (noting that the appellate court will only reverse a lower court if the error was prejudicial).

The criminal-justice system likewise tolerates many varieties of police misconduct without invoking exclusion. For example, the Court in *Frazier v. Cupp* held that a confession obtained by a police officer who had lied to the suspect was not automatically inadmissible.<sup>155</sup> In *Frazier*, the police falsely told a suspect during his interrogation that a co-suspect, Rawls, had confessed to the crime.<sup>156</sup> The Court found that “[t]he fact that the police misrepresented the statements that Rawls had made is . . . while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.”<sup>157</sup> In other words, an intrinsically evil act of the police, such as lying, that results in the obtaining of a confession, which is the most damning evidence of guilt,<sup>158</sup> is not so serious a blow to judicial integrity as to require the judge to suppress the confession.<sup>159</sup> Other forms of police misrepresentation used to obtain confessions, such as posing as an undercover agent or prisoner, or deliberately misleading a defense attorney about the status of a suspect, likewise do not render evidence thereby obtained inadmissible.<sup>160</sup>

Unconstitutional and overly intrusive searches and seizures of many kinds are also tolerated and do not trigger suppression. For example, a search or seizure carried out by a private individual, even if it is unreasonable, does not implicate the Fourth Amendment.<sup>161</sup> Accordingly, evidence seized during private searches is admissible. Moreover, a government search that merely continues or replicates a private intrusion is not a “search” under the Fourth

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155. 394 U.S. 731, 737–39 (1969).

156. *Id.* at 737.

157. *Id.* at 739.

158. See Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 4–8 (2008) (describing the singularly important impact of confession evidence); see also *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (“A confession is like no other evidence. Indeed ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’” (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting))).

159. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that lying by police was not serious enough to warrant exclusion of a confession). Whether all police deception is morally illicit is beyond the scope of this Article. No claim is made here that all permissions of falsity in another’s mind are unjust. For instance, few would claim that the patrons of Anne Frank were unjust in allowing Nazis to believe erroneously that she was not hiding in the home. ANNE FRANK, *ANNE FRANK: THE DIARY OF A YOUNG GIRL 13–17* (Bantam Books 1993) (1947). The question of affirmative lying is more complicated and has spurred great debate. Even Albert the Great and his pupil, Aquinas, are reported to have disagreed on such matters: “Aquinas, like Kant and apparently unlike his teacher Albert the Great, was a rigorist in allowing no exceptions to the prohibition of lying.” A.S. McGrade, *What Aquinas Should Have Said? Finnis’s Reconstruction of Social and Political Thomism*, 44 AM. J. JURIS. 125, 132 (1999).

160. See *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (holding that a confession given to a law-enforcement authority posing as a fellow prisoner was admissible); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (holding that the “deliberate misleading of an officer of the court” regarding the status of a criminal suspect is not a basis for suppressing the suspect’s confession).

161. See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (stating that the Fourth Amendment only proscribes government action, not the actions of individuals).

Amendment; instead, it will be judged according to “the degree to which [the government agents] exceeded the scope of the private search.”<sup>162</sup>

Even when the police engage in illegal searches and seizures, exclusion is not always required. Suppose that the police illegally eavesdrop on a phone conversation between *A* and *B*, in which they implicate each other, as well as *C*, in a criminal enterprise. Thereafter, *A*, *B*, and *C* are each tried in separate criminal trials. The Court’s decisional authority would hold that suppression is required at *A*’s and *B*’s trials, but not at *C*’s trial. This line drawing can be explained as a matter of standing.<sup>163</sup> As a second example, assume that an illegal search of *D*’s home by the police uncovers a murder weapon and leads to the identification of a witness who can provide incriminating testimony against *D*. Case law holds that the murder weapon must be excluded but that the witness may be permitted to testify.<sup>164</sup> Inanimate objects are suppressed, but tainted witness testimony is often allowed.<sup>165</sup> As a third example, the Court has declined to apply the exclusionary rule in federal habeas corpus proceedings.<sup>166</sup> Many other exceptions to the exclusionary rule have been recognized by the Court, such as the good-faith exception,<sup>167</sup> the public-safety exception,<sup>168</sup> and the inevitable-discovery exception.<sup>169</sup> In seeming contradiction to the position of the value-based proponents, evidence is more likely to be admitted under the good-faith exception when courts<sup>170</sup> or legislators,<sup>171</sup> rather than the police, are the source of the misconduct or error.

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162. *Id.* at 115.

163. *See Alderman v. United States*, 394 U.S. 165, 174 (1969) (holding that Fourth Amendment rights cannot be vicariously asserted). Courts no longer treat the issue of standing separately from the merits of a suspect’s Fourth Amendment claims. *Rakas v. Illinois*, 439 U.S. 128, 138–39 (1978). Thus, in the case of a contested search, a court would simply ask whether the suspect had an expectation of privacy in the area searched by the police. *See Katz v. United States*, 389 U.S. 347, 350–51 (1967) (holding that the Fourth Amendment protects against some, but not all, intrusions upon an individual’s expectation of privacy).

164. *See United States v. Ceccolini*, 435 U.S. 268, 274–75 (1978) (declining to adopt a “*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment”).

165. *Id.* at 275 (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search).

166. *See Stone v. Powell*, 428 U.S. 465, 494–95 (1976) (concluding that in federal habeas corpus proceedings, the static social costs of suppressing evidence because of violations of the Fourth Amendment outweigh the marginal deterrent benefits achieved in such a collateral context).

167. *See, e.g., United States v. Leon*, 468 U.S. 897, 924 (1984) (recognizing a good-faith exception to the exclusionary rule).

168. *See, e.g., New York v. Quarles*, 467 U.S. 649, 651 (1984) (recognizing a public-safety exception to the exclusionary rule).

169. *See, e.g., Nix v. Williams*, 467 U.S. 431, 448 (1984) (recognizing an inevitable-discovery exception to the exclusionary rule).

170. *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995).

171. *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987).

Additionally, even when officers trespass on a privately owned open field, the property they seize there will not be suppressed via the exclusionary rule.<sup>172</sup>

These examples demonstrate that in multiple contexts, including Fourth Amendment jurisprudence, the legal system often tolerates substantial misconduct and error. Moreover, it absorbs error occurring in the courtroom more frequently than error occurring at the stationhouse. Imperfection is accepted because the rules of procedure and admissibility are themselves merely the means to an end: justice. In the context of the criminal trial, justice resides more firmly and centrally in a truthful verdict than in the procedures that lead to it. To more fully appreciate this ends-means distinction, a brief discussion of the concept of justice is required.

Justice is commonly defined as external action, or, in other words, action that is directed toward enhancing the good of another.<sup>173</sup> This concept can also be described as “the habit whereby a person . . . renders to each his due.”<sup>174</sup> Justice, according to this view, is concerned with both the internal quality of an act and with its external consequences.<sup>175</sup> As justice is a habit, however, it remains fundamentally a disposition of the individual.<sup>176</sup> This basic definition of justice originated with Plato<sup>177</sup> and Aristotle,<sup>178</sup> while Christian thinkers, building upon these premises,<sup>179</sup> reached various conclusions about justice by

172. *Oliver v. United States*, 466 U.S. 170, 179–80 (1984) (holding that it was unnecessary to exclude drugs found on private property marked with no trespassing signs and bounded by fences and woods because the property was an “open field” and thus was not entitled to Fourth Amendment protection).

173. It is “external” in the sense that it is directed toward the good of another. *See supra* notes 167–69.

174. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 21 (Kenelmus Foster O.P. et al. eds., Eyre & Spottiswoode Blackfriars ed. 1975).

175. This should not be taken as the only theory of justice; there are several others of note. One such approach is the social-contract theory, reflected preeminently in the writings of John Rawls, particularly in *A Theory of Justice* in which Rawls proposes a notion of “justice as fairness” and a theoretical “original position” from which to determine the principles that order a just society. JOHN RAWLS, *A THEORY OF JUSTICE* 17–18 (1971). Another view is that justice “is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbour also . . . . [J]ustice, alone of the virtues, is thought to be ‘another’s good’, because it is related to our neighbour . . . .” ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, 1003–04 (Richard McKeon ed., 1941) (citation omitted).

176. ARISTOTLE, *supra* note 175, at 1003–04.

177. PLATO, *Republic*, in *PLATO COMPLETE WORKS* 971, 975–1009 (G.M.A. Grube trans., 1997) (discussing various theories of justice before reaching a conclusion as to its nature).

178. ARISTOTLE, *supra* note 175, at 1002 (“We see that all men mean by justice that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just . . . .”).

179. CH. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 12 (John Petrie trans., 1963) (“To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosophers of our own day runs a thread of universal agreement on this point.”).

adding in elements drawn from theology.<sup>180</sup>

Notwithstanding these variations, several common and basic understandings about justice can be confidently asserted. Foremost among these is that justice cannot be sustained in the absence of truth. This is so because justice, by its very nature, is an equitable judgment directed externally to other persons.<sup>181</sup> As Aquinas instructs, the purpose of justice is “to govern a man in his dealings towards others,” because “[i]t implies a certain balance of equality, as its very name shows . . . .”<sup>182</sup> This does not mean, of course, that *justice* and *equality* are synonymous, as justice is an “unlimited good”<sup>183</sup> while equality is not.

Just as truth is the conformity of the intellect with reality, so too justice is the equitable conformity of our intentional acts<sup>184</sup> with reality in relation to other persons.<sup>185</sup> There is no need for justice in a society consisting of friends;

180. ETIENNE GILSON, *THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS* 308 (1956) (“St. Thomas hastens to profit by this admission to make a distinction between Greek justice, which is entirely directed to the good of the city, and a particular justice, enriching the soul which acquires and exercises it as one of its most precious perfections. This time it is no longer in Aristotle that St. Thomas finds the text which authorizes him to proclaim that this justice exists, it is in St. Matthew’s Gospel: ‘Blessed are they who hunger and thirst after justice.’” (citation omitted)).

181. See AQUINAS, *supra* note 174, at 111, 113 (“True and false are opposed as contraries, and not as affirmation and negation as some have held . . . . Just as truth gives the adequate notion of a thing, so falsity gives an inadequate notion of it.”).

182. *Id.* at 5.

183. As Mortimer Adler has noted:

[A]ll real goods are not of equal standing. . . . Some real goods are truly good only when limited. Pleasure is a real good, but we can want more pleasure than we need or more than is good for us to seek or obtain. The same is true of wealth. These are limited real goods. In contrast, knowledge is an unlimited real good. We can never seek or obtain more than is good for us.

. . . [J]ustice is an unlimited good, as we shall presently see. One can want too much liberty and too much equality—more than it is good for us to have in relation to our fellowmen, and more than we have any right to. Not so with justice. No society can be too just; no individual can act more justly than is good for him or for his fellowmen.

MORTIMER J. ADLER, *SIX GREAT IDEAS* 137 (1981) [hereinafter ADLER, *SIX GREAT IDEAS*]. As Aristotle wrote of justice, “‘neither evening nor morning star’ is so wonderful . . . .” ARISTOTLE, *supra* note 175, at 1003.

184. Aristotle, for one, claims that “a man acts unjustly or justly whenever he does such acts voluntarily; when involuntarily, he acts neither unjustly nor justly except in an incidental way; for he does things which happen to be just or unjust.” ARISTOTLE, *supra* note 175, at 1015. For example, *T* commits an unjust act but is not unjust if he testifies, with sincere belief, that *A1* was the man he saw murder *B* when the reality is that *A1* has long been lost and his yet unknown twin brother, *A2*, was the real killer. Even though *A1* will be unjustly convicted, *T* is not guilty of being unjust. If results were all that mattered, then absurd possibilities would be allowed—for example, one who intended to unjustly deprive an investor of money by selling a worthless piece of property could later be considered to have acted justly if the land subsequently is discovered to contain large oil reserves and turns a nice profit for the investor.

185. Adler distinguishes between speaking falsity and lying:

There is a clear difference between the judgment that what a man says is false and the judgment that he is telling a lie. His statement may be false without his necessarily being a



as a matter of historical reality, justice is the mortar that binds men together.<sup>186</sup> To act justly necessarily demands conformity of the intellect with reality so that proper judgments can be made. In this sense, lying, deceptive silence, or the obfuscation of the truth can compound the injury to justice, as these intentional acts or omissions create disparity between the intellect and reality in another's mind.

Thus, lying and obfuscation can be doubly injurious to justice. First, they can frustrate the desires of another for true knowledge. Second, they can separate the intellect of another from reality, thereby causing skewed judgment and baseless actions.<sup>187</sup> Such discordant conduct is commonly referred to as injustice. In other words, justice is the equitable conformity of action with reality, and injustice is the inequitable discordance of action and reality.<sup>188</sup>

In the context of a criminal trial, truth is most fully realized when the guilty are convicted and the innocent are acquitted.<sup>189</sup> The suppression of probative, reliable, and relevant evidence of guilt, especially if it results in the acquittal of one who is guilty, therefore constitutes an injustice. The Supreme Court has called the search for the truth the central purpose of a criminal trial and the "fundamental goal" of the criminal-justice system.<sup>190</sup> The Federal Rules of

liar. Try as he will to speak truthfully by saying precisely what he thinks, he may be mistaken in what he says through error or ignorance.

The person we ask for directions may honestly but erroneously think that a certain road is the shortest route to the destination we wish to reach. When he tells us which road to take, what he says is false, but not a lie. However, if he does in fact know another road to be shorter and withholds that information from us, then his statement is not only false, but also a lie.

ADLER, *SIX GREAT IDEAS*, *supra* note 183, at 38.

186. MORTIMER ADLER, *ARISTOTLE FOR EVERYBODY* 109, 114 (1978) [hereinafter ADLER, *ARISTOTLE FOR EVERYBODY*] (distinguishing between speaking falsely and lying by noting that "[w]here love is absent, justice must step in to bind men together in states, so that they can live peacefully and harmoniously with one another, acting and working together for a common purpose").

187. Thus, if *A* lies to *B*, claiming that *C* took *B*'s television when, in reality, *A* was the thief, then *A* doubly injures justice. First, *A* intentionally confounds *B*'s desire for knowledge as to what happened to his television. Second, *A* directs blame and, possibly, punishment toward the undeserving *C*. Hence, *B* rightly will be angry if he discovers *A*'s fraud; not only did *A* lie to *B*, but such lie may have caused *B* to engage in retributive acts toward *C*.

188. AQUINAS, *supra* note 174, at 57 ("[I]njustice [is] unfairness towards another person, which comes from resolving to have more goods, riches, for instance, or honours, than we ought to have, or less evils, burdens, for instance, or taxes, than we ought to bear. So injustice has a special subject-matter, and is a particular vice contrary to particular justice.").

189. See, e.g., *United States v. Cronin*, 466 U.S. 648, 655 (1984) (stating that "the ultimate objective [of the United States criminal justice system is] that the guilty be convicted and the innocent go free" (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975))).

190. *United States v. Havens*, 446 U.S. 620, 626 (1980) (remarking that "arriving at the truth is a fundamental goal" of the justice system); see also PAUL C. GIANNELLI, *UNDERSTANDING EVIDENCE* § 1.07, at 13 (2003) (calling the ascertainment of truth the "main goal" of a criminal trial). See generally Joseph D. Grano, *Ascertaining the Truth*, 77 *CORNELL L. REV.* 1061 (1992) (arguing the importance of discovering the truth in the criminal-justice system); Eugene R.

Evidence are an important means to this “fundamental goal.” The rules state that their basic purpose is “that the truth may be ascertained.”<sup>191</sup> When criminal trials produce truthful results, their legitimacy is enhanced and the public is reassured and more secure.<sup>192</sup> When court rules deceive the fact-finder, thereby causing the guilty to be acquitted, truth is encumbered, justice is threatened, and legitimacy is compromised.<sup>193</sup>

To clarify the point, it is useful to consider concrete examples and applications of these concepts in circumstances that are analogous to criminal trials.

- Suppose the hiring committee of a grade school learns, through evidence illegally obtained by a school employee, that an applicant for a teaching position has a history of sexually abusing children. Should this information be excluded from the hiring committee’s consideration in order to preserve the integrity of the school system and its hiring practices?
- Suppose a regulating and approving authority learns, through evidence illegally obtained by one of its field investigators, that a prescription drug being considered for approval is laced with a dangerous toxin. Should this information be excluded from the authority’s consideration in order to preserve the integrity of the drug-approval process?
- Suppose a law professor learns, through evidence gathered by a research assistant in a manner that violates the school’s honor code, that a student who received an “A” grade cheated on a final examination. Should this information be excluded from the professor’s determination of the cheating student’s grade and the school’s determination of the cheating student’s class standing in order to preserve the integrity of the academic culture and grading process?
- Suppose a sport’s governing body learns, through evidence obtained by an employee in a manner that violates the protections afforded to medical records, that a first-place swimmer used banned performance-enhancing drugs during a swim meet. Should this information be

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Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects’ Dignity*, 41 VAL. U. L. REV. 1, 3 (2006) [hereinafter Milhizer, *Rethinking Police Interrogation*] (explaining that “truthful confessions are singularly capable of promoting the search for truth, which the Supreme Court has described as a ‘fundamental goal’ of the criminal justice system and the central purpose of a criminal trial” (citations omitted)).

191. FED. R. EVID. 102.

192. See *United States v. Nobles*, 422 U.S. 225, 230 (1975) (“The dual aim of our criminal justice system is ‘that guilt shall not escape or innocence suffer.’” (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (explaining that the purpose of a criminal trial is to “sort[] the innocent from the guilty”).

193. See Milhizer, *Rethinking Police Interrogation*, *supra* note 190, at 6–7 (discussing the importance of truthful confessions in developing the actual and perceived reliability and legitimacy of the criminal-justice system).

excluded from the medal-determination process in order to preserve the integrity of the athletic competition?

The answer to each of the above questions is obvious: the evidence should not be excluded. A contrary decision is normatively indefensible. As these hypotheticals illustrate, a rule that excludes relevant truth from a decision-making process causes decision-makers to act incongruently with justice.<sup>194</sup> As a result, it tends to undermine the integrity, both real and perceived, of the process and product of the criminal-justice system.<sup>195</sup>

This is not to say that a principled and legitimate search for truth may never yield to countervailing considerations.<sup>196</sup> Privacy, liberty, and property interests can be implicated by searches and seizures, illegal or otherwise. On rare occasions, human dignity and the common good may be so severely damaged by outrageous police misconduct that justice, as constitutionally expressed by the protections of due process, requires suppression.<sup>197</sup> In other circumstances, rules that promote important values through the exclusion of evidence in narrow situations, such as testimonial privileges,<sup>198</sup> are needed even when they are in tension with an unencumbered search for the truth.<sup>199</sup> The extent to which the search for truth can be legitimately burdened, and the manner in which the courts can address illegally obtained evidence while preserving the truth, are serious topics that merit careful consideration. Perhaps the illegal conduct of the police officer could be made known at trial

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194. See *Elkins v. United States*, 364 U.S. 206, 216 (1960) (“[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammelled disclosure of competent and relevant evidence in a court of justice.”).

195. See Milhizer, *Rethinking Police Interrogation*, *supra* note 190, at 6–7.

196. See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (discussing some fundamental constitutional violations that, upon occurrence, will always require reversal of a conviction).

197. *Id.*

198. See Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, 357–60 (1935) (discussing the most traditional and basic privileges of withholding information and arguing for and against expanding the privileges); see also Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, in H-792 PRACTISING LAW INST., LITIGATION AND ADMINISTRATION PRACTICE SERIES LITIGATION COURSE HANDBOOK 257, 274–75 (2009) (explaining the differences between testimonial privileges, which protect the communication but do not necessarily protect the information in the communication if it is available through other legal means, and informational privileges, which protect the information regardless of how it was communicated or found). Sometimes testimonial privileges prevent the consideration of relevant and truthful information that cannot be obtained by any means other than by the informant, who is excluded from testifying. *Cf. id.* (discussing the extent of protection granted to information revealed in testimonial privilege contexts). Suppressing such information inhibits one from understanding all of the relevant circumstances and thus encumbers the search for truth.

199. See, e.g., *Gonzalez v. Sullivan*, 934 F.2d 419, 426 (2d Cir. 1991) (Oakes, J., concurring) (stating that “[the American] accusatorial system is constructed around a series of concerns about individual rights . . . [on which] . . . a higher value [is placed and] . . . [t]he ascertainment of ‘truth’ . . . must sometimes yield to this higher value” (citations omitted)).

so that the jury could consider it in weighing the credibility of the police and the evidence they present. Or perhaps criminal punishment can be mitigated to account for any violations of Fourth Amendment rights suffered by convicted criminals because of police misconduct; this type of mitigation might even be recognized under the Federal Sentencing Guidelines.<sup>200</sup> However, given the supreme importance of truth in achieving justice at a criminal trial, I would argue that courts should suppress truth-affirming evidence only when it is absolutely necessary to achieve some other important, tangible, and immediate purpose.<sup>201</sup>

Judge Robert Bork once remarked:

[One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society.<sup>202</sup>

“[T]hat fierce thing [t]hey call a conscience,”<sup>203</sup> when it is well formed, can provide wise counsel.<sup>204</sup> A well-formed conscience tells us to have grave doubts about the moral claims of exclusionary rule proponents. It instructs that if a court excludes evidence when it is not constitutionally mandated<sup>205</sup> or directly needed to advance some other important value, such as in the case of privilege, it ceases to act as a court. It does not seek justice; instead, it obfuscates the truth without good or sufficient reason. It acts illegitimately and

200. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2006) (authorizing the downward departure of a sentence based on the defendant's acceptance of responsibility for his offense); *id.* § 4A1.3(b)(1) (authorizing the downward departure of a sentence based on the defendant's favorable criminal history).

201. See generally Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 1–4 (2009) (discussing the significance of oaths taken by witnesses swearing to tell the truth and their importance in obtaining truth). Juries hear and see the administration of this oath, and witnesses swear to it. The exclusion of evidence can result in misleading, abusing, and disrespecting the jury, as well as requiring witnesses to evade or finesse their oaths.

202. Interview by Patrick B. McGuigan with Judge Robert H. Bork, in Washington, D.C. (Sept. 5, 1985), reprinted in PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK app. B, at 290–91 (1990).

203. THOMAS HOOD, *Lamia*, in MISCELLANEOUS POEMS OF THOMAS HOOD 17, 70 (Epes Sargent ed., 1918).

204. THOMAS A. KEMPIS, OF THE IMITATION OF CHRIST 257 (F.A. Paley trans., 1881) (“Diligently examine thy conscience, and to the best of thy power cleanse and purify it by true contrition and humble confession; so as not to have or know of any thing to give thee remorse, and hinder thy free access.”).

205. If the Constitution requires the suppression of evidence, then the rule of law and respect for legitimate authority requires that it be suppressed even if this encumbers the search for truth. *Poindexter v. Greenhow*, 114 U.S. 270, 291–92 (1885) (discussing how a lack of respect for legitimate constitutional authority would undermine the efficacy of the Constitution).

undermines the integrity, both real and perceived, of the criminal-justice system. Evaluating the exclusionary rule through this prism, the so-called value-based justification cannot be sustained. Courts act with integrity only when they apply just laws to seek the truth and thereby obtain real justice.<sup>206</sup>

## VI. SOME FINAL THOUGHTS

And so I return yet again to the conclusion in my earlier article that it is time for the Supreme Court to act like a court rather than a quasi-legislative body.<sup>207</sup> The Court may wish to reconsider whether the exclusion of unconstitutionally obtained evidence is constitutionally mandated.<sup>208</sup> This is a jurisprudential issue within the Court's competence and authority to decide. If the Court adheres to the position that the exclusionary rule is not of constitutional origin, there exists no justification—narrow and pragmatic, noble and expansive, or value-based and integrity-centered—that would justify anything approaching the broad range of exclusion required under the present rule.

If the Court instead decides that exclusion is not constitutionally required, then it must repeal the exclusionary rule and leave it to the policy-making branches of government to develop rules and procedures for addressing police misconduct.<sup>209</sup> This would place on lawmakers increased responsibilities to create a regime that at once punishes and deters police misconduct while protecting the truth-seeking purpose of a criminal trial. Rules created by the legislature or executive could better serve utility in that they can more effectively account for a broad range of variables and be adjusted over time.

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206. ST. AUGUSTINE, ON FREE CHOICE OF THE WILL 10–11 (Anna S. Benjamin & L.H. Hackstaff trans., 1964) (explaining that “a law that is not just is not a law”).

207. *Dickerson v. United States*, 530 U.S. 428, 456 (2000) (Scalia, J., dissenting) (arguing that the Court's “continued application of the *Miranda* code to the States despite [the Court's] consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of *Miranda*'s salvation but rather evidence of its ultimate illegitimacy”). The same can be said about a court-imposed Fourth Amendment exclusionary rule. See generally Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) [hereinafter Grano, *Prophylactic Rules*] (discussing the limits on the Court's authority to create prophylactic rules).

208. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (calling the exclusionary rule a “judicially created remedy” that “has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons”). Justice Brennan, a proponent of the exclusionary rule, lamented that the Court's deconstitutionalization “left [him] with the uneasy feeling that . . . a majority of [his] colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases.” *Id.* (Brennan, J., dissenting).

209. See Grano, *Prophylactic Rules*, *supra* note 207, at 101–03 (explaining that if prophylactic rules are not constitutionally required, then they are not legitimate and may even be subject to legislative modification and superseding). Even if the exclusionary rule were completely repealed and no new legislative or executive initiatives were undertaken, the criminal justice system would retain the ability to address the consequences of especially egregious police misconduct through mechanisms such as prosecutorial discretion and executive clemency and pardons. A discussion of these processes is beyond the scope of this article.

They are also more capable of integrating nobler and more majestic aspirations and can better enhance the integrity of the courts and the legitimacy of the law. Finally, they could “unburden society from the consequences of an immoral and unwise rule, imposed by an illegitimate authority, designed to minimize one evil by threatening a different and often greater evil.”<sup>210</sup> I appreciate the many comments and critiques prompted by my earlier article, and I hope that I have done them justice with this response.

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210. Milhizer, *supra* note 1, at 768.

