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## Economics Perspective on the Exclusionary Rule and Deterrence, An

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# An Economics Perspective on the Exclusionary Rule and Deterrence

Michael D. Cicchini \*

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## I. INTRODUCTION

In *Herring v. United States*, the Supreme Court affirmed that when the police seize evidence in violation of a citizen’s Fourth Amendment privacy rights, that evidence should *rarely* be excluded from the citizen’s subsequent criminal trial.<sup>1</sup> Instead, the so-called exclusionary rule should *only* be applied if exclusion of the evidence would deter future police misconduct against hypothetical citizens whose constitutional rights have yet to be violated.<sup>2</sup> Additionally, the ill-gotten evidence should only be excluded in cases where

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1. *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (Exclusion should be “our last resort, not our first impulse.”) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

2. *Id.* (“[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”).

this future deterrent effect is *substantial* and outweighs the societal costs of freeing the guilty citizen.<sup>3</sup>

Quite emphatically, the Court justifies the use of the exclusionary rule by focusing entirely on the concept of deterrence. Specifically, if the exclusion of evidence in a particular case would not deter future police misconduct, or would only minimally deter it, then the costs of exclusion are deemed too great, and the exclusionary rule will be disregarded.<sup>4</sup> This raises the critical question that lies at the heart of this Article: *does the exclusionary rule actually deter police misconduct?* If it does *not* deter, then the application of the exclusionary rule should not, and cannot, be limited or at all affected by the concept of deterrence.<sup>5</sup>

The social science of economics is well suited to answer this important question.<sup>6</sup> More specifically, one economic theory in particular – the economic theory of criminal sanction – can be adapted to predict the exclusionary rule’s deterrent effect on future police misconduct. This theory, in its original context, states that criminal behavior can be deterred by increasing either the criminal’s risk of apprehension or the severity of the criminal sanction, such as the term of incarceration, or both. Conversely stated, the criminal will *not* be deterred from committing a crime, and will instead choose to commit the crime, if the expected benefits of the crime (B) exceed the expected costs ( $p \cdot C$ ), where  $p$  = the probability of conviction, so that  $0 < p < 1$ , and C = the cost of the criminal sanction.<sup>7</sup>

This theory, however, can be used much more broadly and can explain the deterrent effect of any given sanction on any given behavior, criminal or otherwise. This includes, of course, the exclusionary rule’s deterrent effect, if any, on future police misconduct. In short, this economic theory states that the exclusionary rule will *not* deter police misconduct, and the police will instead choose to violate a suspect’s constitutional rights, if the expected benefits to the police (B) exceed their expected costs ( $p \cdot C$ ), where  $p$  = the probability that the evidence will be suppressed, so that  $0 < p < 1$ , and C = the cost to the police of the lost conviction.<sup>8</sup>

Conversely stated, in order for the exclusionary rule to effectively deter future police misconduct, the expected cost to the police of their misconduct ( $p \cdot C$ ) would have to be greater than the expected benefits to the police of the same misconduct (B). If the expected costs are too low – that is, if  $B > p \cdot C$  – then the police will choose to commit the misconduct and violate the sus-

3. *Id.* (In order to justify the use of the exclusionary rule, exclusion must “result[] in appreciable deterrence[,]” and “the benefits of deterrence must outweigh the costs.”) (quoting *United States v. Leon*, 468 U.S. 897, 909-10 (1984)).

4. *Id.* (“[T]he exclusionary rule is not an individual right” and is not “a necessary consequence of a Fourth Amendment violation.”).

5. See *infra* Part II.

6. See *infra* Part III.A.

7. See *infra* Part III.B.

8. See *infra* Part III.C.

pect's Fourth Amendment rights, and the exclusionary rule will have failed to deter.<sup>9</sup>

This Article will demonstrate that the exclusionary rule *does not* and *cannot* deter police misconduct. The reason is that the expected cost to the police of their own misconduct ( $p \cdot C$ ) is nearly always zero. More specifically, the probability that the evidence will be suppressed ( $p$ ), even in cases of egregious police misconduct, is very close to zero.<sup>10</sup> Additionally, even in the rare case that evidence is suppressed, the cost to the police of a lost conviction ( $C$ ) is nearly always zero for several reasons: first, the police tend to value arrests, not convictions; second, even if they did value convictions, suppressed evidence does not necessarily mean the conviction is lost; and third, often the police have nothing to lose when they choose to commit misconduct – that is, the conviction would not even be possible *unless* the police commit the misconduct in the first place.<sup>11</sup>

Finally, in addition to the very low probability that evidence will be suppressed ( $p$ ) and the very low cost to the police of a lost conviction ( $C$ ), there are simply no effective secondary sanctions to fill the void and deter police misconduct.<sup>12</sup> Therefore, the benefit to the police of their misconduct ( $B$ ) will nearly always exceed the expected costs of the same misconduct ( $p \cdot C$ ).

The economic theory of criminal sanction, therefore, answers the question in the negative: *the exclusionary rule does not, and cannot, deter police misconduct*. As a result, this Article argues that the application of the exclusionary rule should not be limited or affected in any way by the fallacious concept of deterrence. Further, the exclusionary rule should neither be eliminated nor be replaced with an alternative remedy. Instead, other important societal concerns previously ignored by the Court – concerns such as the integrity of the judiciary and remedying the individual that was actually harmed by the police misconduct<sup>13</sup> – mandate that the exclusionary rule be made inseparable from the underlying constitutional right it was designed to protect.<sup>14</sup> As a result, evidence should be excluded from any subsequent criminal trial whenever a citizen's Fourth Amendment rights are violated.

## II. THE EXCLUSIONARY RULE AND THE GOAL OF DETERRENCE

When the police violate a citizen's Fourth Amendment rights through an illegal search and seizure, the seized evidence will *rarely* be suppressed at the

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9. *See id.*

10. *See infra* Part III.C.1.

11. *See infra* Part III.C.2.

12. *See infra* Part III.C.3.

13. *See infra* Part IV.B.

14. *See infra* Part V.

citizen's subsequent criminal trial.<sup>15</sup> In fact, the exclusion of evidence – the only realistic remedy available to all but the most wealthy and powerful citizens – will only be ordered if the trial court finds that exclusion would deter future police misconduct.<sup>16</sup> Most recently, the Supreme Court held that

[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies. Indeed, exclusion has always been our *last resort*, not our first impulse, and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is *not an individual right* and applies only where it results in appreciable deterrence. We 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*.

In addition, the benefits of deterrence must outweigh the costs. We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. To the extent that application of the exclusionary rule could provide some incremental deterrent, *that possible benefit must be weighed against its substantial social costs*.<sup>17</sup>

This holding has several bizarre effects. First, it makes the exclusionary rule a misnomer; in fact, when exclusion is treated as a last resort, it would be far more accurate to label it the exclusionary exception rather than the rule. Second, by proclaiming that the exclusion of illegally obtained evidence is not an individual right, the Court has effectively turned the Fourth Amendment into a right without a remedy. This, of course, reduces our protection “against unreasonable searches and seizures”<sup>18</sup> to little more than an empty

15. *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (Exclusion should be “our last resort, not our first impulse.”) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). See also *infra* Part III.C.1.

16. *Herring*, 129 S. Ct. at 700 (“[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”); Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America*, 70 MO. L. REV. 519, 520-21 (2005) (“Over time, and without explicit warning, the Court shifted focus from the principles of remedy and integrity to a deterrence rationale . . . . Although the shift . . . was achieved by subtle means, there is no understating the significance of [this] move.”).

17. *Herring*, 129 S. Ct. at 700 (emphasis added) (internal citations and quotations omitted).

18. U.S. CONST. amend. IV.

catchphrase.<sup>19</sup> After all, without the remedy of exclusion, “[t]here can be no serious assertion that relief is available under 42 U.S.C. § 1983”<sup>20</sup> or, for that matter, under any other imaginable remedy.

Third, despite the Court’s mantra that the benefits of deterrence must be weighed against the social costs of excluding the evidence, the Court never attempts to actually do so. Instead, it has replaced the weighing of costs and benefits with the simple assumption that, in nearly every circumstance, the social costs are too great to justify exclusion.<sup>21</sup> Fourth, by focusing exclusively on future deterrence, the Court has neglected numerous other equally important concerns, including maintaining the integrity of the judiciary and providing redress for the citizen that was actually harmed by the constitutional violation.<sup>22</sup>

These last two issues – the Court’s failure to actually weigh the benefits of exclusion against the costs and its exclusive focus on deterrence to the neglect of other concerns – will be addressed more fully in Part IV of this Article. The first and more compelling question, however, is whether the Court’s focus on deterrence – even in small part, let alone exclusively – is justified. In other words, the critical question is this: *does the exclusionary rule actually deter future police misconduct?* With regard to this issue, one author recently commented,

It is surprising that the Court’s assumption, that the exclusionary remedy *does* deter abuses of constitutional rights, has gone mostly unremarked in the voluminous commentary on the exclusionary rule. Subsequent judicial decisions and academic scholarship have ignored or *accepted this dubious contention*. . . . Thus the very assertion that the Court made, that exclusion promises to [deter,] . . . has escaped scrutiny.<sup>23</sup>

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19. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (stating that the failure to exclude illegally obtained evidence would reduce the Constitution to “a form of words”).

20. *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting).

21. See *infra* Part IV.A.

22. See *infra* Part IV.B.

23. Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1445 (2000) (emphasis added). Even Richard Posner, the renowned law and economics scholar whose work is cited and adapted to support the main argument in this Article, has glossed over the point and simply assumed it to be true. See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982) (arguing that, from a societal standpoint, the exclusionary rule sometimes over deters police misconduct); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (1981) (arguing that, in other cases, the exclusionary rule actually under deters police misconduct).

This question – whether the exclusionary rule actually deters police misconduct – is an incredibly important one and is the primary focus of this Article. The reason the question is so important is that if the Court’s assumption is wrong – that is, if the threat of exclusion does not deter police misconduct – then the application of the exclusionary rule should not be limited by the concept of deterrence. In the next Part of this Article, basic economic reasoning will expose the fallacy of deterrence and demonstrate why the exclusionary rule does not, and cannot, deter police misconduct.

### III. THE ECONOMIC FALLACY OF DETERRENCE

In *Herring*, both the majority and the dissents oddly agreed on one critical point: the exclusionary rule *does* deter police misconduct. For example, the dissenters asserted that the exclusionary rule should be used to deter not only intentional misconduct but also negligent misconduct.<sup>24</sup> The majority, conceding that the exclusionary rule could deter even negligence, felt that it simply was not worth the price and should only be used to deter intentional misconduct.<sup>25</sup>

Despite the Justices’ agreement on this point, however, the empirical evidence from numerous studies is not convincing. “No one is going to win the empirical debate over whether the exclusionary rule deters the police from committing a significant number of illegal searches and seizures.”<sup>26</sup> This inconclusive evidence is the result, in large part, of “significant methodological flaws” in the existing studies.<sup>27</sup> Further, due to the inherent limitations in

24. *Herring*, 129 S. Ct. at 708 (discussing a “foundational premise of tort law – that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care”) (Ginsburg, J., dissenting).

25. *Id.* at 702 (“We do not quarrel with Justice Ginsburg’s claim that ‘liability for negligence . . . creates an incentive to act with greater care,’ and we do not suggest that the exclusion of this evidence could have *no* deterrent effect.” (internal citations omitted)).

26. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368-69 (1999). See also *United States v. Janis*, 428 U.S. 433, 453 (1976) (“Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled” regarding the deterrent effect of the exclusionary rule.); *United States v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007) (“[E]mpirical evidence of the rule’s deterrent effect is difficult, if not impossible, to come by.”). However, because the burden of proof always falls on the claimant, a case could certainly be made that there is no empirical evidence to prove the claim that the exclusionary rule deters. See, e.g., Daniel H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1969) (“As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure.”); L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 672-73 (1998) (Unfortunately, “[t]he rule has failed to deter.”).

27. Slobogin, *supra* note 26, at 369-71.

such studies and the difficulty in carrying out such research, we are unlikely ever to obtain reliable empirical evidence.<sup>28</sup>

Fortunately, however, empirical data is not needed. Instead, we can turn to fundamental and intuitive economic theory to demonstrate that the exclusionary rule does not deter police misconduct.<sup>29</sup> As a result, the rule's application should not, and cannot, be limited or affected in any way by the concept of deterrence.

### A. *The Explanatory Power of Economics*

"Economics has had an incredible influence on legal scholarship. While previously confined to areas such as antitrust and tax, economic analysis has since expanded into most areas of the law."<sup>30</sup> Despite its popularity, however, the law and economics movement certainly has its critics and often for good reason.<sup>31</sup> This inter-disciplinary field of study is sometimes built on multiple layers of assumptions and numerous questionable inferences. As a result, the economic analysis of the law often leads to dubious outcomes and can quickly devolve into a mere academic exercise with no theoretical, let alone practical, value.

Yet this problem does not stem from the discipline of economics itself, but rather from our stretching it beyond its usefulness or applying it where it cannot offer insight. Conversely, some of the simplest economic models can be incredibly useful in analyzing the law and can shed genuine light on important legal issues.

One example of a simple and useful economic model is the theory of criminal sanction, which essentially predicts that crime can be deterred by increasing the criminal's risk of apprehension, the expected punishment, or both.<sup>32</sup> This model is not terribly complicated or controversial; however, within its simplicity and predictive accuracy lies its usefulness. Further, the

28. Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1368 (2008) ("Quantifying the behavioral effects of the exclusionary rule is, as Oaks reported, impossible.").

29. Empirical data can be incredibly helpful in formulating legal policy and often has no substitute. See, for example, Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1 (2008), which tested whether expert knowledge on false confessions was already within the common knowledge of prospective jurors. In that case, there was no economic or other behavioral science model that could have predicted the answer; instead, empirical data was required. See *id.*

30. Bryan D. Lammon, Note, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101, 1119 (2007).

31. See, e.g., Slobogin, *supra* note 26, at 372 (criticizing the economic analysis of law for often relying on "highly suspect assumptions").

32. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 242-50 (5th ed. 1998).



model can be adapted to other contexts in order to predict the deterrent effect of any given sanction on any given behavior, criminal or otherwise.

The model will first be explained and illustrated in its traditional context and then will be expanded and applied to a new context – police searches and seizures – in order to demonstrate that the exclusionary rule does *not* deter police misconduct.

### *B. Crime, Punishment, and the Rational Criminal*

Simply stated, “[t]he theory of the criminal sanction . . . is one of *deterrence*. The state reduces the demand for crime by setting a ‘price’ for it in the form of an expected cost of having to pay a fine or go to prison for committing crimes[.]”<sup>33</sup> This theory begins by recognizing that “[a] person commits a crime because the expected benefits of the crime to him exceed the expected costs.”<sup>34</sup> The expected benefits may be strictly financial, as is typical in property crimes such as burglary, theft, or forgery. However, this is not necessarily the case; expected benefits may also take other less tangible or less quantifiable forms. For example, non-monetary benefits include the emotional rewards that accrue to a criminal from so-called crimes of passion. Conversely, the expected costs of criminal activity include, most notably, the direct costs of the criminal sanction. These consist of the possibility of a prison or jail sentence, probation, or a fine.<sup>35</sup>

Therefore, in order to effectively deter criminal activity, a criminal sanction must set the criminal’s expected cost of the criminal activity at an amount greater than the expected benefit. That is, a sanction will be effective only if  $p \cdot C > B$ , where  $p$  = the probability of conviction, so that  $0 < p < 1$ ,  $C$  = the cost to the criminal of the criminal sanction, and  $B$  = the expected benefit of a completed, successful crime.<sup>36</sup> If a sanction failed to set  $p \cdot C > B$ , then it would fail to deter criminal conduct. In other words, if a sanction for a particular crime were too low, a rational criminal would choose to commit the crime because “the expected benefits of the crime to him exceed the expected costs.”<sup>37</sup>

Applying this model to a hypothetical, potential criminal will better illustrate the concept. Suppose, for example, that a person has the opportunity to commit a misdemeanor crime with an expected benefit of, say, \$1,000. (Valuing the expected benefit of a crime, including accounting for moral mis-

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33. *Id.* at 250 (emphasis added).

34. *Id.* at 242.

35. *Id.*

36. *Id.* at 243 (“[T]he criminal sanction ought to be so contrived that the criminal is made worse off by committing the act.”).

37. *Id.* at 242.

givings, is an interesting economic and philosophical topic.<sup>38</sup>) Further, the probability of being discovered, prosecuted, and convicted for this particular crime is low, and the person estimates it to be only two percent. Finally, because of the person's prior criminal record, if convicted he would expect to receive the maximum term of imprisonment allowed for the misdemeanor crime, which he places at a personal cost to him of \$20,000.<sup>39</sup> In this case, then, the expected cost of the crime ( $p \cdot C$ ) is only \$400 ( $.02 \cdot \$20,000$ ).<sup>40</sup> On the other hand, as we have already stated, the expected benefit of the crime is \$1,000. Therefore, because "the expected benefits of the crime to him exceed the expected costs[.]"<sup>41</sup> he will commit the crime, and the criminal sanction has failed to deter the criminal conduct.<sup>42</sup>

Before going any further, however, the preceding paragraph raises two issues that must be addressed. First, the theory of criminal sanction does not assert that would-be criminals expressly or overtly make this computation when considering potential crimes. But the calculation is done implicitly and "at least in a rough and ready way[.]"<sup>43</sup> Further, and more significantly,

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38. The expected benefit of a successful, completed crime would include the expected monetary gain or expected pleasure but would be reduced by other concerns, including moral qualms. This, of course, would vary for each prospective criminal and for each prospective crime. For example, most sexually active eighteen-year-old adults would have no moral issues with having sexual contact with a consenting seventeen-year-old child, yet many states have criminalized such conduct. See, e.g., WIS. STAT. ANN. § 948.09 (West 2005). Likewise, many people have no moral issues whatsoever with cheating on their taxes, which is also criminal. Conversely, however, many people *would* have moral issues with stealing money from a sole proprietorship owned by their close friend or relative. The greater the moral issues associated with the crime under consideration, the lower the expected benefit of the successful, completed crime.

39. It is important to keep in mind that the cost of the criminal sanction is just that – the cost of being caught and prosecuted. It does not include the cost of any moral or ethical misgivings, which would exist whether the person was caught and prosecuted or, on the other hand, escaped punishment altogether. These moral and ethical issues are instead incorporated into, and negatively affect, the expected benefit of committing the crime.

40. It will become obvious in the next Section that, for purposes of this Article, it is the relationship among the numbers, and not the precise numbers themselves, that is important.

41. POSNER, *supra* note 32, at 242.

42. This example illustrates that the decision-making process is incremental in nature and that the expected benefits (B) and expected costs (C) are actually measured on the margin. That is, the actual decision under consideration is *not* whether to be "a criminal" but whether to commit a single, specific criminal act.

43. POSNER, *supra* note 32, at 179 (discussing incentives in the context of tort law). See also Posner, *Rethinking the Fourth Amendment*, *supra* note 23, at 6 (explaining, in a different context, that it is irrelevant whether the actors under observation "explicitly think or speak in that language").

a growing empirical literature on crime has shown that criminals respond to changes in . . . the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model – and this regardless of whether the crime is committed for pecuniary gain or out of passion, or by well educated or poorly educated people.<sup>44</sup>

Second, there is an important assumption implicit in the expected cost calculation. Valuing the risk of being imprisoned ( $p \cdot C$ ), which was valued above at \$400, assumes that the criminal would otherwise be free. That is, the potential criminal is *not* incarcerated at the time he considers committing the crime, and if he chooses not to commit the crime, he will continue to enjoy his freedom. In other words, the potential criminal has something to lose. This is an important point that will surface later in this Article; therefore, a brief illustration will be useful.

Suppose the same facts as the hypothetical example above, only this time suppose that the person is already incarcerated for life without the possibility of parole. Therefore, the crime under consideration would necessarily be one that occurs while in confinement, such as theft of another inmate's property, battery of a correctional officer, or even escape from custody. With these potential crimes, the calculus of the economic theory of criminal sanction changes dramatically. No matter how great the probability of conviction ( $p$ ), the expected cost of the crime ( $p \cdot C$ ) becomes zero. Why? Because the person is already incarcerated for life without the possibility of parole and therefore is not affected by the threat of additional incarceration. In other words, the cost of the criminal sanction ( $C$ ) = zero, and, therefore, the expected cost of the crime ( $p \cdot C$ ) = zero, while the expected benefit ( $B$ ) remains positive. As a result, the inmate would choose to commit the crime.

However, we know that not all inmates incarcerated for life commit crimes, despite the positive expected benefits. One of the reasons is that, although the cost of the criminal sanction ( $C$ ) is effectively zero, there are penalties other than additional incarceration that serve to deter criminal conduct. These include the loss of privileges and the risk of solitary confinement within the institution, among other penalties. Therefore, these secondary sanctions can serve as a deterrent to criminal conduct, even when the primary sanction (incarceration) does not. This is an important point that will be revisited in the next Part, which adapts the economic theory of criminal sanction for use in analyzing police officers and their behavior when investigating suspects.

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44. POSNER, *supra* note 32, at 243 (citing several empirical studies on the “rational-choice model of criminal behavior”).

*C. Adapting the Model: The Rational Police Officer  
and the Sanction of Exclusion*

Applying the model in the preceding Section was insightful for criminal law purposes, in that it predicted the deterrent effect of a potential criminal sanction on a rational would-be criminal. However, the value of the economic theory of criminal sanction is actually much broader; that is, it can be used to predict the deterrent effect of any given sanction on any given behavior, criminal or otherwise. Therefore, the model is easily adaptable to analyzing police officer conduct in light of the potential sanction of excluding evidence under the exclusionary rule.<sup>45</sup>

This new application, then, begins by recognizing that a police officer will violate a suspect's constitutional rights if the expected benefits to the police officer exceed the expected costs.<sup>46</sup> The expected benefits would include, of course, a criminal conviction for the state. However, in most cases, the mere arrest itself, even if only temporary, would be tremendously beneficial. Why? Because the arrest and subsequent search of the suspect could result in the confiscation of property or contraband that the police would retain, even if the arrest is later deemed illegal.<sup>47</sup> Or, as is quite common, the police may even obtain information about other cases or suspects by interrogating the arrested suspect. In that case, the person against whom the information is ultimately used would have no standing to assert the constitutional rights of the wrongly arrested suspect.<sup>48</sup> Conversely, of course, because we

45. Lammon, *supra* note 30, at 1122 (The economic theory of criminal sanction can be used “when discussing how to best deter police (in the Fourth Amendment search context, one must remember that it is the police who are the potential law-breakers).”).

46. Sharon L. Davies, *The Penalty of Exclusion – A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1306 (2000) (“[S]avvy police officers or prosecutors versed in the many exceptions to the exclusionary rule might decide that the consequences of violating the Fourth Amendment, if any, are worth the benefits to be gained from engaging in such misconduct.”).

47. Oaks, *supra* note 26, at 728 (“Even if the evidence is suppressed in court, the officer, through the act of retrieval, would have fulfilled his duty to confiscate illegal substances.”); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 950 (1983) (“In most cases, the police are not concerned with convictions or even prosecutions, but rather with case clearances, [and] the removal of contraband items such as narcotics from circulation . . . .”); Perrin, Caldwell, Chase & Fagan, *supra* note 26, at 675 (“[T]he officer has an overriding interest in seizing illegal weapons or narcotics . . . .”).

48. Davies, *supra* note 46, at 1304 (“[T]ainted evidence may be admitted at an accused’s criminal trial . . . if the person opposing the use of the evidence lacks standing to make the claim . . . .”); Slobogin, *supra* note 26, at 375 n.39 (noting that the exclusionary rule will not prevent the state from using evidence “against someone whose rights were not violated”).

are dealing with the exclusionary rule, the potential cost to the police of violating a suspect's rights would be the exclusion of evidence in any subsequent criminal proceeding against that suspect.

Therefore, in order to effectively deter police misconduct, the exclusionary rule must set the police officer's expected cost of his misconduct at an amount greater than the expected benefit. That is, the sanction of excluding evidence will be effective only if  $p \cdot C > B$ , where  $p$  = the probability of suppression, so that  $0 < p < 1$ ,  $C$  = the cost to the police officer of the lost conviction, and  $B$  = the expected benefit to the police officer of his illegal conduct. However, if  $p \cdot C < B$ , then the exclusionary rule would fail to deter the police misconduct. In other words, if the expected benefits of the police misconduct exceed the expected cost, then the rational police officer will engage in the misconduct, and the exclusionary rule will have failed to deter.<sup>49</sup>

The reality is that, in nearly every case, the exclusionary rule will *fail* to deter police misconduct. This is true for two reasons. First, the expected benefits of the misconduct ( $B$ ) will always be positive. If they were zero, the officer would not even consider the course of action. Why? Because the opportunity cost of conducting an activity with no expected benefit would serve as an inherent deterrent. In other words, even in the rare case that the officer had very little to do with a great deal of available time, he could nearly always find a more rewarding activity than committing misconduct from which he would expect to derive no benefits whatsoever.<sup>50</sup>

Second, while the expected benefits of the misconduct will always be positive, the expected costs ( $p \cdot C$ ) will always be zero or at least approaching zero. This is true for three reasons: first, the probability of suppression ( $p$ ), even in cases of clearly illegal police conduct, is incredibly low; second, even assuming that the evidence is suppressed, the cost of the lost conviction ( $C$ ) is nearly always zero; and third, there are no secondary sanctions to deter the police misconduct. Each of these claims – and particularly the claim that the cost of a lost conviction is zero – requires further explanation.

### 1. The Probability of Suppression

Even if the police were to commit egregious misconduct and violate a suspect's constitutional rights, the probability that the evidence would be suppressed ( $p$ ) is still very low. The reason is that, in order for the evidence

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49. Slobogin, *supra* note 26, at 391-92 (discussing a study where police admitted to conducting illegal searches and preferred the existing exclusionary rule to the possibility of other sanctions or damages remedies); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 137-38 (2003) (“[T]he police would rather live with an ‘indirect’ sanction, like the exclusionary rule, than a direct one.”).

50. This is one reason that police have no incentive to randomly search and violate the constitutional rights of those citizens that live in perceived low crime, affluent suburbs, for example.

to be suppressed, a long chain of events must occur.<sup>51</sup> First, the defendant must obtain counsel. Although the right to counsel is, at least theoretically, a constitutional guarantee, in practice it is a promise that often goes unfulfilled.<sup>52</sup> Second, even if the defendant were to obtain counsel, the attorney would have to be effective enough to recognize and litigate the suppression issue.<sup>53</sup>

Third, and most significantly, even if the defendant were to obtain competent counsel, the defendant would then have to resist a plea offer in a system designed to dispose of cases – sometimes as many as ninety five percent or more – via a plea bargain.<sup>54</sup> One of the reasons for the prevalence of plea bargaining is that today a single alleged criminal act rarely results in a single criminal charge. Instead, multiple counts are often charged for a single act without violating double jeopardy protections.<sup>55</sup> Additionally, the defendant's status – for example, if he has a prior controlled substance conviction, a prior felony conviction, or even prior misdemeanor convictions – will often

51. Barnett, *supra* note 47, at 955-56 (listing a chain of events that an officer must anticipate before he will be deterred from illegal police conduct).

52. See, e.g., Maureen Dimino, *Confronting a Constitutional Crisis: Miami-Dade Chief Public Defender Stands His Ground*, THE CHAMPION, Oct. 2008, at 24 (describing how excessive caseloads for Miami Public Defenders prevent them from rendering even minimal, constitutionally effective representation to indigent clients); Bill Rankin, *In Georgia, Lawyers Abandoning the Poor*, THE ATLANTA JOURNAL-CONSTITUTION, May 6, 2009, at A1 (describing how the Georgia Public Defender has no money to pay outside counsel for its conflict cases and therefore many indigent defendants have no representation).

53. Failure to litigate pretrial matters can often be due to a lack of skill and training or the lack of available time and resources. See, e.g., Dimino, *supra* note 52, at 26 (“No matter how brilliant and dedicated the attorney, if given too large a workload, the attorney will not be able to provide her clients with the representation they are owed under the Sixth Amendment.”).

54. Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004) (“Current Department of Justice estimates indicate that in excess of 95 percent of all federal convictions are resolved via a guilty plea.”).

55. Most states now have many hundreds, if not a thousand or more, different crimes in their criminal codes from which prosecutors may pick and choose. Further, as long as the elements of the crimes are slightly different, multiple convictions and consecutive punishments are permitted under state and federal constitutions. See, e.g., *Harris v. State*, 254 N.W.2d 291, 295-96 (Wis. 1977) (holding that “the same criminal act may constitute different crimes with similar but not identical elements”). As an example, a defendant accused of a single act of grabbing an alleged victim by the neck during an argument may be charged with multiple crimes, each with a different element, including the following: strangulation (because the neck was grabbed); false imprisonment (because the grab restricted movement); battery (because the grab caused pain); dissuading a victim from reporting a crime (because the grab prevented, at least temporarily, reporting the crime to the police); and disorderly conduct (because the grab caused a disturbance).

result in higher potential penalties per count.<sup>56</sup> All of this, of course, gives the prosecutor a vast amount of leverage and room to negotiate. In nearly every case, a prosecutor can make an offer that is difficult to refuse and can easily induce a plea and a waiver of the suppression motion in exchange for the reduction or dismissal of some of the charges.<sup>57</sup>

But even if the defendant obtains competent counsel and refuses to enter into a plea bargain, the odds are overwhelming that the suppression hearing will be unsuccessful.<sup>58</sup> One reason for this, quite bluntly, is that the police commonly lie – a practice the police themselves have coined “testilying” – at suppression hearings.<sup>59</sup> For example, the police merely have to testify that the defendant made a furtive movement – regardless of whether the movement had an innocent explanation or even happened at all – or that the defendant appeared nervous. Then, nearly any police action will be justified, and the defendant’s suppression motion will be denied.

In one survey, police officers quite brazenly revealed “a litany of manufactured tales concerning bulges in pockets, suspicious items in plain view, traffic violations, money changing hands, and reliable informants[,]” all designed, of course, to sell their misconduct to the judge presiding over the suppression hearing.<sup>60</sup> Trial judges, in turn, are often all too eager to accept the

56. See, e.g., WIS. STAT. § 961.48 (2006) (making simple possession of marijuana a felony when the defendant has been convicted of any other drug crime, including misdemeanor possession of drug paraphernalia, at any time in the past); *id.* § 939.62 (increasing the maximum penalty on a misdemeanor to two years imprisonment when the defendant has been convicted of three misdemeanor counts, or one felony count, in the previous five years). Other laws are even more onerous, such as California’s “three strikes” law, where “criminals convicted for a second time must serve double the normal sentence, and . . . those with three strikes must get 25 years to life.” *Criminal Law in California: A Voice for the Forsaken*, THE ECONOMIST, June 13, 2009, at 88.

57. Standen, *supra* note 23, at 1452 (stating that, when the police violate constitutional rights to obtain evidence, prosecutors will simply offer larger concessions when plea bargaining in order to secure a conviction); Perrin, Caldwell, Chase & Fagan, *supra* note 26, at 675 (arguing that because plea bargaining is the most common means of disposition in any given case, police misconduct will likely never be exposed).

58. Alschuler, *supra* note 28, at 1375 (citing empirical research demonstrating that suppression motions are successful less than one percent of the time).

59. *Id.* at 1376-77 (discussing multiple studies, including police surveys, that have exposed how police officers will “twist the facts,” “fabricate probable cause after the fact,” “shade the facts,” and practice “testilying” in order to defeat defendants’ suppression motions) (internal quotations and citations omitted); Slobogin, *supra* note 26, at 375-76 (“Even given its full potential breadth, exclusion’s punch is reduced considerably by police facility in lying about their actions . . .”).

60. Alschuler, *supra* note 28, at 1377 (discussing the “Mollen Report” on New York City police officers) (internal quotations omitted).

officers' fabricated version of events, deny the suppression motion, and admit the evidence.<sup>61</sup>

Additionally, there are also myriad exceptions, including the so-called inevitable discovery doctrine, that make "today's swiss cheese exclusionary rule . . . a mere shadow of what it could be."<sup>62</sup> The result, of course, is that the exceptions have swallowed the "battered and bloodied" exclusionary rule, and evidence is rarely suppressed.<sup>63</sup> Finally, defendants rarely appeal trial court decisions, and, when they do, appellate courts give tremendous deference to the fact-finding and credibility determinations of the trial judge. This means, of course, that for the few cases that are actually appealed, only a very small percentage of that incredibly tiny pool will actually be reversed.<sup>64</sup>

Therefore, because the probability of suppression ( $p$ ) is near zero, the expected cost of the misconduct ( $p \cdot C$ ) will approach zero. For this reason alone, the expected benefit of the police misconduct will nearly always exceed the expected cost. However, as the next Part illustrates, the expected cost to the police of their misconduct falls even closer to zero because the cost to the police of a lost conviction ( $C$ ) is, in itself, nearly always zero.

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61. Slobogin, *supra* note 26, at 376 (discussing possible reasons for the judiciary's acceptance of police testimony, including "the hindsight biasing effect of judicial knowledge that criminal evidence was found, and judicial reticence in excluding dispositive evidence"); Oaks, *supra* note 26, at 725 ("[T]he courtroom issue typically becomes a contest of credibility that the trier of fact is likely to resolve in favor of the officer."); Perrin, Caldwell, Chase & Fagan, *supra* note 26, at 676 ("The courts, in their efforts to avoid exclusion, contort and complicate the law of search and seizure . . ."); George C. Thomas, III & Barry S. Pollack, *Saving Rights from A Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 148-49 (1993) ("Judges who wish to admit evidence must therefore avoid the suppression category. This methodology . . . encourages judges to warp Fourth Amendment doctrine and to engage in creative fact-finding . . ."); Kamisar, *supra* note 49, at 132 ("[M]any judges will feel tremendous pressure to admit the illegally seized evidence and will often find a way to do so.").

62. Slobogin, *supra* note 26, at 375; *see also* Davies, *supra* note 46, at 1305 (detailing the numerous exceptions to the exclusionary rule, including the use of evidence (1) to impeach, (2) against a defendant who lacks standing to challenge the evidence, and (3) where the state could show the evidence "would 'inevitably' have been discovered despite the misconduct of the police"); Halliburton, *supra* note 16, at 536 ("[T]he deterrence-oriented theory of exclusion became a tool for carving out still more exceptions to the rule.").

63. Perrin, Caldwell, Chase & Fagan, *supra* note 26, at 673.

64. Barnett, *supra* note 47, at 965 (discussing the pressures and constraints on appellate courts forcing them to affirm trial court level denials of suppression motions).



## 2. The Cost of a Lost Conviction

Even assuming the very rare case in which evidence is actually suppressed, the cost of the lost conviction to the offending officer (C) is nearly always zero. This is true for several reasons. First, just because evidence is suppressed does not necessarily mean a conviction will be lost. Often, there will be other evidence upon which a conviction can be based. Second, in many cases, the officer does not even value the conviction. Rather, he only values the arrest, which allows him to take the suspect's contraband or other property – property that will not be returned regardless of whether the suspect is prosecuted – and allows him to detain and question the suspect to obtain information about other cases.<sup>65</sup>

However, even assuming every link in the chain to be true – that is, that evidence will be suppressed *and* that the suppression will result in dismissal of the case against the suspect *and* that the officer values convictions and not just arrests – the cost of a lost conviction is still zero. Why? Because the misconduct costs the officer a lost conviction only if the conviction would have otherwise been obtainable *without* the misconduct.

This critical point is better understood by analogy to the original theory of criminal sanction. Recall the important assumption implicit in the model: the criminal sanction of imprisonment is costly only if the would-be criminal is free – that is, not incarcerated – at the time he chooses to commit the crime. Conversely, if he is incarcerated for life without the possibility of parole, the sanction of imprisonment is cost free. In other words, unless the would-be criminal has something to lose, the sanction does not deter him from committing the crime.

Likewise, the sanction of exclusion is cost free for the offending officer. This is nicely illustrated by the two factual scenarios discussed in *Herring*. First, there is the case of *intentional* police misconduct, the type that the *Herring* majority claimed the exclusionary rule is best suited to deter. The *Herring* Court stated,

In *Weeks*, a foundational exclusionary rule case, the officers had broken into the defendant's home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U.S. Marshal to confiscate even more. Not only did they have no search warrant, which the Court held was required, but *they could not have gotten one had they tried*. They were so lack-

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65. See *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (The exclusion of evidence “is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”).

ing in sworn and particularized information that not even an order of court would have justified such procedure.<sup>66</sup>

This scenario demonstrates that, despite the Court's misconception to the contrary, intentional misconduct is actually the conduct *least* likely to be deterred by the exclusionary rule. Why? Because on the one hand, the officers can choose to obtain the evidence illegally, in which case it may be excluded, thus possibly (or even probably) leaving the officers with no evidence. On the other hand, the officers can honor the suspect's constitutional rights and forego the illegal search, in which case they are guaranteed to have no evidence. Remember that obtaining a search warrant, as the Court in *Herring* and *Weeks* observed, was not even a possibility; if it had been, the officers would have simply obtained one and collected the evidence by legal means.<sup>67</sup> Instead, with no possibility of obtaining a search warrant, and with no other legal means of confiscating the evidence, the officers have nothing to lose (and everything to gain) by conducting the illegal search and seizure.<sup>68</sup> Therefore, the risk that the evidence will later be excluded cannot possibly deter the misconduct.

The second scenario discussed in *Herring* is the violation of a suspect's constitutional rights through negligent police misconduct. This was the issue in the *Herring* case itself, where a police officer saw the defendant engaging in completely lawful activities yet was suspicious because the defendant was "no stranger to law enforcement."<sup>69</sup> The officer therefore wanted to find a

66. *Herring v. United States*, 129 S. Ct. 695, 702 (2009) (citing *Weeks v. United States*, 232 U.S. 383 (1914)) (internal quotations omitted) (emphasis added).

67. *See id.* In situations where officers do have a legal basis to obtain a warrant but cannot do so due to time constraints, they may rely on any one of the numerous "exigent circumstances" exceptions to the warrant requirement. *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91 (1990) (warrantless entry lawful due to risk that suspect may escape during the time it would take to obtain a warrant); *United States v. Plavcak*, 411 F.3d 655 (6th Cir. 2005) (warrantless search lawful due to risk that evidence could be destroyed during the time it would take to obtain a warrant); *United States v. Soto-Beniquez*, 356 F.3d 1 (1st Cir. 2003) (warrantless entry lawful when officers were in hot pursuit of suspect and therefore did not have time to obtain a warrant); *United States v. Moskow*, 588 F.2d 882 (3d Cir. 1978) (warrantless entry lawful due to risk that officers or citizens could be harmed during time it would take to obtain a warrant).

68. Barnett, *supra* note 47, at 957 ("Where there is no legally permissible means of obtaining vital evidence the police presently have little or nothing to lose by violating a suspect's rights . . . . The worst that can happen is that the evidence will be suppressed. Ironically, if a conviction would not be possible without the evidence, the illegal conduct can only make a conviction more likely."); Alschuler, *supra* note 28, at 1370 ("In cases in which the issue is simply whether to search or not, the police ordinarily have nothing to lose by searching in violation of the Fourth Amendment. Moreover, they often have something to gain.").

69. *Herring*, 129 S. Ct. at 698.

reason to arrest the defendant and asked the sheriff's department about active warrants.<sup>70</sup> In fact, a warrant for the defendant's arrest had been issued at one time but was vacated a full five months earlier.<sup>71</sup> Nonetheless, a chaotic and outdated record-keeping system showed the warrant as still being active.<sup>72</sup> Soon thereafter, based on the mistaken belief that a valid warrant existed, the officer arrested and searched the defendant, finding contraband.<sup>73</sup>

For this type of so-called negligent police misconduct – conduct that is arguably the polar opposite of the intentional misconduct described in the first scenario – both the majority and the dissent in *Herring* still agree that the application of the exclusionary rule would serve as a deterrent.<sup>74</sup> In fact, the only difference between the two camps is whether deterrence in that situation was worth the price of letting a guilty person go free; the Court held 5-4 that it was not, and therefore the contraband was admitted into evidence.<sup>75</sup> However, the economic theory of criminal sanction demonstrates that the exclusionary rule fails to deter negligent misconduct for the same reason that it fails to deter intentional misconduct: the police simply have nothing to lose.

Intentional misconduct and negligence, however, are so factually different that the negligence scenario of *Herring* deserves additional explanation. In *Herring*, the negligence was law enforcement's failure to implement a reliable record-keeping system that would adequately reflect when warrants were vacated or cancelled.<sup>76</sup> (The system worked perfectly fine when recording the initial issuance of warrants.) Technically, then, there was no police action to deter; rather, deterrence was replaced by an inducement to upgrade

70. *Id.* at 709 (Ginsburg, J., dissenting) (“The Government argues that police have no desire to send officers out on arrests unnecessarily, because arrests consume resources and place officers in danger. The facts of this case do not fit that description of police motivation. Here, the officer wanted to arrest Herring and consulted the Department’s records to legitimate his predisposition.”).

71. *Id.* at 698 (majority opinion) (“[T]he warrant had been recalled five months earlier.”).

72. *Id.* at 708 (Ginsburg, J., dissenting) (describing the ill-conceived and antiquated system the police used for recording the cancellation of warrants).

73. *Id.* at 698 (majority opinion).

74. The majority believed that the exclusionary rule is best suited for intentional misconduct but also conceded that it would have a deterrent effect on negligent misconduct as well. *See id.* at 702 n.4.

75. *Id.* at 704 (holding that, despite the potential deterrent effect of exclusion, Herring “should not go free because the constable has blundered” (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)) (internal quotations omitted)).

76. *See id.* at 698-99. Actually, the dissenters called into question whether this was merely negligence or something more severe, such as gross or systemic negligence. *Id.* at 706 (Ginsburg, J., dissenting). In fact, when a warrant clerk was asked under oath how often the problem had occurred, she testified, “Several times.” *Id.* at 706 n.2. However, the majority dismissed this testimony, instead finding it “confusing and essentially unhelpful” in reaching its conclusion that the police were guilty of mere negligence. *Id.* at 704 n.5 (majority opinion).

the unreliable and out-dated record-keeping system. The incentive, of course, is the promise that future evidence will not be suppressed.

However, a rational police officer (or here, a rational sheriff's department) quickly sees that the incentive is illusory. Recall that the officer was looking for a reason to arrest the defendant, whom he knew was "no stranger to law enforcement."<sup>77</sup> If the record-keeping system had been up-to-date, it would have reflected that the warrant had been recalled, and therefore the officer would *still* have had no legal basis to arrest the defendant. That is hardly an incentive to spend valuable resources to modernize and update a records system. Conversely, by *not* having up-to-date information, the officer was able to make the arrest and obtain the contraband, and the government was even permitted to use it at the defendant's subsequent criminal trial.<sup>78</sup> In short, law enforcement cannot possibly be any worse off, and will probably be far better off, for *not* updating its records system. Once again, the exclusionary rule fails to deter.

### 3. The Lack of Secondary Sanctions

When using the economic theory of criminal sanction in its traditional context, we saw that when a would-be criminal is already incarcerated for life, the cost of the criminal sanction (C) is zero, and the expected benefits of the crime (B) therefore exceed the expected costs ( $p \cdot C$ ) (or, expressed mathematically,  $p \cdot C < B$ ). As a result, we would expect the would-be criminal to choose to commit the crime. However, we also determined that this is not always the case due to the existence of secondary sanctions, including, for example, the loss of privileges or solitary confinement within the institution.

Likewise, when applying this economic theory to police behavior, because the probability of suppression ( $p$ ) is extremely low and the cost of a lost conviction (C) to the police officer is usually zero, we would expect the police officer to violate the suspect's constitutional rights unless there is an effective secondary sanction. Possible secondary sanctions for the police officer include civil lawsuits, job-related sanctions, and public condemnation. Unfortunately, none of these potential sanctions acts as a deterrent.<sup>79</sup> Further,

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77. *Id.* at 698.

78. Courts routinely condone police officer reliance on faulty data as a means to admit evidence in violation of the Fourth Amendment. *See, e.g.,* *United States v. Groves*, 559 F.3d 637 (7th Cir. 2009) (upholding an investigative detention and search based on dispatcher's false representation that a warrant existed); *State v. Robinson*, 770 N.W.2d 721 (Wis. Ct. App. 2009) (upholding a forced entry into defendant's home based on the National Crime Information Center's false representation that a warrant existed); *State v. Collins*, 363 N.W.2d 229 (Wis. Ct. App. 1984) (upholding an illegal entry into defendant's home based on police department's false representation that a warrant existed).

79. 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.

and perhaps counterintuitively, some even *encourage* police violations of suspects' constitutional rights.

First, when a person's constitutional rights have been violated, that person may, in addition to moving the criminal court judge to suppress evidence, file a civil lawsuit for monetary damages against the offending police officer or police department. However, the threat of this happening offers no deterrence and does not serve as an effective secondary sanction. As the dissent stated in *Herring*, "There can be no serious assertion that relief is available [for a constitutional violation] under 42 U.S.C. § 1983. The arresting officer would be sheltered by qualified immunity, and the police department itself is not liable for the negligent acts of its employees."<sup>80</sup> Additionally, with regard to these potential civil lawsuits,

Such suits are few and far between, and therefore relatively punchless as punishing mechanisms, for a number of reasons: potential plaintiffs' ignorance of their rights and fear of police reprisals; the expense of civil litigation; the obstacles created by incarceration; and the inchoate nature of the injury (which deters lawyers as well as potential plaintiffs from bringing suit). Those suits that are brought are seldom completely successful, again for a number of reasons: the good-faith defenses available to officer-defendants; the unsympathetic nature of many plaintiffs (who are often criminals, or at least associated with criminality); the biases of juries; and, as with exclusion, the efficacy of police perjury.<sup>81</sup>

These reasons are not simply speculation; rather, the evidence has shown that they are real obstacles to any possible monetary recovery and, therefore, eliminate any deterrent effect that civil lawsuits would otherwise have.<sup>82</sup>

Second, another potential and related secondary sanction is job-related discipline of the offending officer. That is, even though the cost of a lost conviction is zero, and even though the cost of a potential civil lawsuit is zero, police may still be deterred from violating suspects' constitutional rights if there were a risk that their superiors would impose some type of job-related punishment.

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L. REV. 1365, 1388-89 (1983) (discussing the failure of secondary sanctions to deter police misconduct).

80. *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting) (internal citations omitted).

81. Slobogin, *supra* note 26, at 385-86 (internal citations omitted); see also Posner, *Rethinking the Fourth Amendment*, *supra* note 23, at 59 (explaining the arguments for why tort remedies are ineffective in deterring constitutional violations, including small potential awards, unsympathetic juries, and judgment-proof officers).

82. Alschuler, *supra* note 28, at 1378 (illustrating the complete ineffectiveness of civil remedies in deterring knock-and-announce violations).

Unfortunately, however, this simply does not happen, and the likely culprit, ironically enough, is the judiciary. By continually carving out exceptions to the exclusionary rule, and by ignoring obvious police perjury at suppression hearings, courts have sent “a clear message that many constitutionally defective evidence-gathering acts will go unpunished. Some police departments have internalized this news as conferring a ‘green light’ to lawless action.”<sup>83</sup> And it is certainly hard to blame police departments for their reaction; after all, it would undoubtedly send police officers a conflicting message if their superiors were to punish them for behavior that has just been rubber stamped by the judiciary.

Further, even in the rare case where evidence is suppressed, the end result is the same, albeit for different reasons. “Police are rarely, if ever, disciplined by their superiors merely because they have been guilty of illegal behavior that caused evidence to be suppressed.”<sup>84</sup> The reason is that, in addition to the suppression of evidence being a rare event, the police simply do not place a high value on convictions. Therefore, they care little about the outcome of suppression hearings. In other words,

[T]he objective of police who conduct searches is, first and foremost, evidence to support an arrest, not a conviction. Yes, police want convictions. But the sociological literature strongly suggests that the primary goal of officers in the field in the average case is to get a “collar.” If they do, they’ve done their job. It is the prosecutor’s job to convict. Furthermore, if the prosecutor manages to convict in any event (which occurs a good proportion of the time), even this tenuous adverse impact may disappear.<sup>85</sup>

In short, “police culture . . . is unsympathetic to rules that restrict investigative power.”<sup>86</sup> Therefore, it is highly unreasonable to expect job-related sanctions to act as a meaningful, secondary sanction for the deterrence of police misconduct.

Third, and finally, it has also been argued that there is a secondary sanction so strong that it not only imposes a great cost and deters police from violating constitutional rights but also renders the exclusionary rule unnecessary. That sanction is informal public condemnation for police misconduct. In other words, the argument is that Fourth Amendment rights are “self-executing, to a greater or lesser degree, because rights express a societal convention, and community actors will tend to follow the convention even if no legal mechanisms exist to enforce the abstract right[.]”<sup>87</sup>

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83. Davies, *supra* note 46, at 1319.

84. Oaks, *supra* note 26, at 725-26.

85. Slobogin, *supra* note 26, at 377-78.

86. *Id.* at 394.

87. Thomas & Pollack, *supra* note 61, at 171-72.

However, in order to accept this argument, one would have to ignore the well-documented evidence – including documented police officer admissions – of blatant and repeated constitutional violations.<sup>88</sup> In light of this overwhelming evidence, the idea that constitutional rights are self-executing is perhaps rooted in a somewhat naïve view of human behavior. Instead, the rational, self-interested economic theory of criminal sanction, adapted to the police officer, is a much better predictor of behavior than the assumption that police will respect the Constitution because society in general does so.

In fact, the argument that public condemnation is an effective deterrent has two distinct problems. First, its assumption that police will somehow adopt societal conventions and values is false. Rather, the police have their own culture, conventions, and values. And, as stated earlier, “police culture . . . is unsympathetic to rules that restrict investigative power.”<sup>89</sup> Second, its assumption that society, in general, values the Constitution and the Fourth Amendment is also false. Instead, just the opposite is true: most citizens view the Constitution as a mere technicality and “think that the suppression doctrine is *defeating* justice.”<sup>90</sup> Often, this view is unalterable unless and until an individual has his own rights violated and experiences the power of the government firsthand.

Interestingly, the naïveté of this public condemnation theory was on full display in a case over which Federal District Court Judge Harold Baer, Jr., presided in 1996:

Judge Baer’s application of the exclusionary rule to suppress evidence against an “obviously guilty” defendant provoked widespread public condemnation, culminating in the sorry spectacle of both major political parties’ leaders threatening to call for the judge’s resignation. The public outrage against Judge Baer reflects an instinctive and deep-seated hostility to the exclusionary rule . . . That hostility, in turn, pressures the judge to find ways around the rule. Indeed, Judge Baer reversed himself shortly after the political uproar.<sup>91</sup>

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88. Alschuler, *supra* note 28, at 1376-77 (discussing multiple studies, including police surveys, that have exposed how police officers will “twist the facts,” “fabricate probable cause after the fact,” “shade the facts,” and practice “testilying” in order to defeat defendants’ suppression motions) (internal quotations and citations omitted); Slobogin, *supra* note 26, at 375-76 (“Even given its full potential breadth, exclusion’s punch is reduced considerably by police facility in lying about their actions . . .”).

89. Slobogin, *supra* note 26, at 394.

90. Oaks, *supra* note 26, at 738 (quoting Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 22 (1964)).

91. Perrin, Caldwell, Chase & Fagan, *supra* note 26, at 672 (discussing *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996)).

In short, there are no effective secondary sanctions to deter police from committing misconduct and violating suspects' constitutional rights. While the theoretical possibility exists, civil lawsuits are a completely ineffective deterrent for multiple reasons. Further, it is unreasonable to expect police departments to impose job-related sanctions for officer behavior that has been approved by the courts. Finally, public condemnation as an informal deterrent is ineffective because the only thing condemned by widespread public opinion is the Constitution itself, rather than its violation by the police.

Consequently, because the probability of suppression ( $p$ ) is near zero, the cost to the police of a lost conviction ( $C$ ) is zero, and there are no effective secondary sanctions to fill in the void in the equation, the expected benefit of committing misconduct ( $B$ ) will nearly always exceed the expected costs ( $p \cdot C$ ). Therefore, the exclusionary rule does not and cannot deter, and the police will instead choose to commit the misconduct and violate suspects' constitutional rights.

#### *D. A Final Word on Economics – The “Dismal Science”*

The economic theory of criminal sanction could be viewed as a rather cynical theory – quite consistent, actually, with the dismal science itself – especially when compared to more positive competing views, such as the self-executing-constitutional-rights theory. Without question, the latter theory is a far more pleasant one, where police respect public conventions and are concerned about public condemnation, and where the public at large values the Constitution.<sup>92</sup> However, the usefulness of a theory does not depend upon whether it describes human behavior in a positive or negative fashion, but whether it accurately *predicts* human behavior.

The accuracy of the economic theory of criminal sanction is, first and foremost, intuitive; after all, it presumes that actors are rational and self-interested and seek to maximize their own benefits. It would certainly be more appealing to divide people into moral and immoral, with moral people following the law and immoral people breaking the law. This wish-thinking, however, faces two serious obstacles. First, it assumes the law is linked to morality, when often it is not.<sup>93</sup> Second, it ignores the reality that even moral

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92. In reality, many people do *not* view Fourth Amendment protections in a positive light. In fact, as the next Part of this Article will show, critics of the exclusionary rule are actually taking aim not at the remedy of exclusion but rather at the underlying right to privacy that it protects.

93. In fact, with today's trend of over-criminalization and the explosion of each state's criminal code – codes that often criminalize a thousand or more different acts – law and morality have drifted far apart. For example, most would agree that it is immoral to cause serious harm to another human being, except in self-defense or defense of others. But is it really immoral for an eighteen year old to have sexual contact with a consenting seventeen year old? Is it really immoral to threaten someone with criminal prosecution in an effort to get them to stop their own undesirable



people – whatever the term may mean – will commit illegal acts if the benefit of doing so (or the cost of not doing so) is sufficiently great.

But one need not rely on intuition to assess the strength of the economic theory of criminal sanction. In fact, its reliability has also been proved by empirical data. Unlike the empirical studies that attempt to gauge the deterrent effect of the exclusionary rule, the economic theory of criminal sanction is much more easily testable, and the studies are more competently designed and their findings more scientifically reliable.<sup>94</sup> As a result, although economic reasoning may not comport with our views of how humans *should* behave, it is nonetheless useful because it accurately predicts how humans *will* behave.

#### IV. OTHER DEFICIENCIES OF DETERRENCE-BASED REASONING

The economic theory of criminal sanction has demonstrated that the exclusionary rule simply does not, and cannot, deter future police misconduct. As a result, the application of the exclusionary rule should not be limited or affected in any way by the concept of deterrence. However, despite this fatal defect, still other significant problems with deterrence-based reasoning deserve some attention.

First, while the Court's framework purports to exclude evidence when the benefits of deterrence outweigh the costs of exclusion, the Court refuses to determine or quantify what the costs actually are. As a result, there will never be anything against which the benefits of deterrence can be weighed. Instead, the Court chooses to categorize the police misconduct and then merely assumes that *negligent* misconduct cannot be deterred to a great extent. Therefore, evidence obtained illegally by means of police negligence will never be suppressed, no matter how small the cost of doing so.

Second, focusing on deterrence as the sole justification for the exclusion of evidence ignores other equally important concerns. These concerns include preserving the integrity of the judiciary and providing redress to the citizen that was actually harmed by the misconduct.

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activity? Is it really immoral to consume marijuana while alcohol consumption remains acceptable? Is it really immoral to leave the scene of an accident after providing your name and phone number but not your driver's license number? Even though most people would answer "no" to at least some of these questions, many states still criminalize all of this behavior.

94. POSNER, *supra* note 32, at 243 (citing several empirical studies that test the "rational-choice model of criminal behavior," including Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 55-63 (1996), and D.J. Pyle, *The Economic Approach to Crime and Punishment*, 6 J. INTERDISC. STUD. 1, 4-8 (1995)).

*A. Why Not Deter Negligent Misconduct?*

Recall that, under the Court's deterrence-based reasoning, even if excluding the evidence would deter future police misconduct, the evidence still will not be excluded unless "the benefits of deterrence . . . outweigh the costs."<sup>95</sup> "The principal cost of [excluding evidence] is, of course, letting guilty and possibly dangerous defendants go free – something that 'offends basic concepts of the criminal justice system.'"<sup>96</sup>

In fact, the *Herring* Court refused to suppress evidence for that very reason – the minimal deterrent effect in that particular case would not "outweigh [the] harm to the justice system[.]" and therefore "the criminal should not 'go free because the constable has blundered.'"<sup>97</sup> In short, the Court stated that "here exclusion is not worth the cost."<sup>98</sup> Curiously, however, the Court reached this conclusion without attempting to determine or even identify "the cost" to the justice system. In other words, the Court never considered whether *Herring* was a "dangerous defendant" who, if allowed to enforce his Fourth Amendment rights, would pose a significant threat to society.<sup>99</sup>

For example, we know that *Herring* "was no stranger to law enforcement"<sup>100</sup> – whatever that phrase may mean – yet at the time of his arrest he was, obviously, not in custody, and his last arrest warrant was recalled five months earlier.<sup>101</sup> We also know that he possessed a controlled substance,<sup>102</sup> yet we do not know if it was a small amount for personal use or if he had large quantities that he intended to deliver. Further, we know that he possessed a pistol,<sup>103</sup> yet we do not know if it was loaded or unloaded. Finally, we know that his possession of the pistol would have been legal but for his prior felony,<sup>104</sup> yet we do not know if his prior felony was for a violent crime, such as armed robbery, or a nonviolent crime, such as adultery or failure to pay child support.<sup>105</sup>

In short, the Court never explored these facts, all of which would have been easily accessible and part of the existing court record. Without these

95. *Herring v. United States*, 129 S. Ct. 695, 700 (2009).

96. *Id.* at 701 (quoting *United States v. Leon*, 468 U.S. 897, 908 (1984)).

97. *Id.* at 704 (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)).

98. *Id.* at 702 n.4.

99. *Id.* at 701.

100. *Id.* at 698.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. For example, in the state of Wisconsin, adultery is a felony punishable by up to three and one-half years in prison for each party to the affair, even if one of the parties was not married. See WIS. STAT. § 944.16 (2006). Likewise, failure to pay child support for more than a 120-day, consecutive time period is also a felony punishable by up to three and one-half years in prison. See WIS. STAT. § 948.22 (2006).

facts, the perceived cost to the justice system of excluding the evidence could not have been determined. And without determining the cost to the justice system, it would have been impossible to determine whether “the benefits of deterrence . . . outweigh the costs.”<sup>106</sup>

One possible reason for the Court’s failure to apply its own test – that is, to weigh the benefits of deterrence against the cost to the justice system – is that the cost of excluding evidence is usually relatively low. This would, of course, weigh in favor of excluding the evidence if, as the Court assumes, deterrence is possible. In fact, despite the general perception that “the criminal defendant who benefits from the . . . exclusionary rule will often be a murderer or a rapist[,]”<sup>107</sup> exclusionary rule litigation rarely involves “murder, rape, and other violent cases.”<sup>108</sup> Rather, most cases are non-violent controlled substance and weapon possession cases.<sup>109</sup> Allowing a defendant to assert his Fourth Amendment rights under these circumstances would, of course, be far less costly to the justice system.

Instead of applying its own framework by weighing the costs and the benefits, the Court simply reaches the conclusion that, in cases of police negligence, the benefit of deterrence cannot outweigh the cost of excluding the evidence, no matter how small that cost may be. In short, “[t]o trigger the exclusionary rule, police conduct must be sufficiently *deliberate* that exclusion can meaningfully deter it.”<sup>110</sup> This approach, however, is based on simplistic and erroneous reasoning. That is, even accepting the assumption, as the Court does, that excluding evidence has the power to deter future police misconduct, there is no reason to believe that negligent misconduct should not or could not be deterred.

First, if deterrence is the goal, then negligence *should* be deterred because the defendant’s constitutional right is violated just the same, regardless of whether the police misconduct is intentional, reckless, grossly negligent, or negligent.<sup>111</sup> These are merely arbitrary classifications of the conduct and fail

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106. *Herring*, 129 S. Ct. at 700. Further, as discussed more fully in Part V of this Article, the entire framework of weighing the benefits of deterrence against the costs of exclusion is nonsensical. The reason is that a remedy is more beneficial if it effectively deters illegal searches. However, with fewer illegal searches, more crime will go undetected and unpunished. Therefore, the costs of the remedy (criminals going unpunished) increases in lock-step fashion with the benefits of the remedy’s deterrent effect (fewer illegal searches).

107. *Kamisar*, *supra* note 49, at 131.

108. *Id.*

109. *Id.*

110. *Herring*, 129 S. Ct. at 702 (emphasis added).

111. The Court in *Herring* tries to formulate its deterrent-based rule around these arbitrary classifications of behavior and even opines that “systemic negligence” might be a category worthy of deterrence. *Id.* But it is highly unlikely that judges could accurately and consistently place police behavior into these multiple, vague, and arbitrary categorizations. Additionally, such a classification scheme misses the point by

to focus on the underlying right being violated. Further, these arbitrary classifications give trial judges the opportunity to simply place the police misconduct into the negligence category, thereby dispensing with the exclusionary rule altogether. Continually labeling police misconduct as merely negligent, and then using that label to justify the courts' use of ill-gotten evidence, places the police "outside the ambit of appropriate social standards, and their illegal behavior is routinely recharacterized as a technical transgression."<sup>112</sup> This, in turn, necessarily "reduces formerly fundamental constitutional rights to something less than fundamental."<sup>113</sup>

Second, again assuming that deterrence is the goal, negligence *can* be deterred just as effectively as intentional misconduct. The belief that "only if the decision maker considers the possible results of her actions can she be deterred"<sup>114</sup> is grossly inaccurate. In fact, such a belief "runs counter to a foundational premise of tort law – that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care."<sup>115</sup> In other words, "[e]verybody takes precautions against accidents; the interesting question is how extensive the precautions taken are."<sup>116</sup>

### B. Is Deterrence the Only Concern?

If one accepts the assumption that excluding evidence can deter police misconduct, then it is uncontroversial that deterring misconduct is a legitimate and desirable goal. However, focusing solely on deterrence at the expense of other concerns can be costly. In fact, the Court's single-minded devotion to deterrence means that it has ignored another equally important concern: the integrity of the judiciary.

As we have seen, by focusing exclusively on the concept of deterrence, courts will, in the vast majority of circumstances, admit evidence – or, conversely stated, refuse to exclude evidence – despite the fact that the police obtained it in violation of a citizen's constitutional rights. In these cases,

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improperly focusing on the nature of the behavior rather than the right it violates. As the dissenter in *Herring* contended, "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base is evocative of the use of general warrants that so outraged the authors of our Bill of Rights." *Id.* at 709 (Ginsburg, J., dissenting) (internal quotations omitted).

112. Halliburton, *supra* note 16, at 543.

113. *Id.*

114. *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007). This position was somewhat modified by the majority of the Court in *Herring v. United States*, 129 S. Ct. 695 (2009), which conceded that negligence *can* be deterred – but not very much or very effectively – thus causing the costs of exclusion to always outweigh the benefits of deterrence. *Herring*, 129 S. Ct. at 702 n.4.

115. *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

116. POSNER, *supra* note 32, at 179.

even if the police misconduct was merely negligent, excluding the evidence would still serve an incredibly important purpose: “It enables the judiciary to avoid the taint of partnership in official lawlessness, and it assures the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”<sup>117</sup>

Similarly, others have argued that the government’s use of evidence obtained in violation of the Constitution “would impermissibly compromise the integrity of the judicial system by derogating from the tribunal’s own commitment to constitutional commands.”<sup>118</sup> Likewise, the “admission of evidence collected in violation of the Fourth Amendment would compound the constitutional harm already inflicted by the police by involving the courts in those misdeeds *ex post*.”<sup>119</sup> Even more significantly, the use of tainted evidence in criminal proceedings creates an inescapable double standard for the courts, which are “forbidding conduct (constitutional violations) on the one hand and at the same time participating in the forbidden conduct by acquiring and using the resulting evidence.”<sup>120</sup>

But the *Herring* Court’s focus on deterrence, at the expense of all other concerns, has created an even bigger problem. That is, by focusing exclusively on deterrence – which, as we have now seen, has the necessary effect of admitting vast amounts of evidence in violation of the Fourth Amendment – the Court “leaves *Herring*, and others like him, with no remedy for violations of their constitutional rights.”<sup>121</sup>

The key to this quotation is the word “remedy,” which is defined as the means by which “the violation of a right” is not only prevented but also “redressed or compensated” after the fact.<sup>122</sup> In other words, a remedy is the means employed to redress an injury.<sup>123</sup> This concept, of course, necessarily focuses on the injured or wronged party. However, the Court’s single-

117. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)); *see also* *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.”).

118. *Halliburton*, *supra* note 16, at 520.

119. *Davies*, *supra* note 46, at 1300.

120. *Oaks*, *supra* note 26, at 668; *see also* *Halliburton*, *supra* note 16, at 542 (“[T]he accumulating constitutional injury continues through the use of unlawfully collected evidence at trial . . . by giving the government an advantage over the individual that the rules of the game say it shall not have.”).

121. *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting). *See also supra* Part III.C.3 (demonstrating how alternative remedies are completely ineffective).

122. BLACK’S LAW DICTIONARY 1320 (8th ed. 2004).

123. *See id.*

mindful devotion to “deterring Fourth Amendment violations *in the future*”<sup>124</sup> only protects hypothetical citizens, who have yet to be identified, against future wrongs that have yet to occur. In short, focusing on future deterrence completely ignores the vital concepts of redress and compensation, which makes deterrence-based thinking a poor foundation for a remedy.<sup>125</sup> In other words, future deterrence does nothing to restore the identifiable and wronged citizen to the place he would have enjoyed absent the government’s misconduct.<sup>126</sup>

This concept of restoring the wronged individual is so central to an effective remedy that it must be the philosophical cornerstone of any proposed solution. This is the subject of the next Part of this Article.

## V. EXCLUSION IS STILL THE SOLUTION

Because the exclusionary rule does not deter police misconduct, the application of the rule should not be limited, constrained, or in any way guided by the fictitious notion of deterrence. But if, as this Article has demonstrated, the exclusionary rule fails to deter future police misconduct, then why exclude any evidence at all? Why not simply dispense with the exclusionary rule altogether? The answer, of course, is that such an approach would obliterate the Fourth Amendment, reducing it to nothing more than a hollow right without any remedy. More specifically,

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124. *Herring*, 129 S. Ct. at 700 (emphasis added).

125. Halliburton, *supra* note 16, at 539.

126. Interestingly, some have argued that evidence should never be excluded because the remedy of exclusion only offers redress to individuals from whom evidence was actually seized. Conversely, if the police were to violate a suspect’s rights via an unlawful detention and search but seize no evidence in the process, the remedy of exclusion would do this suspect no good, despite the harm suffered from the illegal detention and search. Therefore, the argument continues, evidence should not be excluded for anyone. This argument, however, fails on at least three grounds. First, even the suspect from whom evidence is seized is not compensated for the illegal detention and search; rather, exclusion remedies only the additional level of misconduct (the seizure), which is above and beyond the illegal detention and search. Second, the argument is also based on the faulty assumption that a remedy must work for everyone or it may not be used for anyone. (Here, an analogy to tort law is insightful. Under this argument, a victim of trespass and resulting property damage would not be allowed a remedy for property damage simply because a person who was the victim only of a trespass could not obtain the same remedy.) Third, as explained in Part V of this Article, this argument is actually disingenuous and is “less an assault on the exclusionary rule than upon the validity of the substantive right sought to be protected by constitutional provisions forbidding unreasonable searches and seizures.” Oaks, *supra* note 26, at 737 (quoting Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 U. ILL. L. REV. 1, 19 (1950)).

If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. . . . The advantage of the exclusionary rule – entirely apart from any direct deterrent effect – is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees.<sup>127</sup>

Many critics of the exclusionary rule, however, have advocated not merely for its abolition but rather for its replacement with another sanction that would better deter future police misconduct. These proposed alternatives, some of which this Article has raised and then dismissed as being equally ineffective deterrents, include “money damages, such as fines and constitutional torts . . . criminal sanctions for offending police officers, internal police discipline . . . or some combination.”<sup>128</sup>

The first and obvious problem with these proposals, as demonstrated earlier in the context of secondary sanctions, is that “[c]ivil remedies are wholly inadequate to compensate the individual whose Fourth Amendment rights are compromised.”<sup>129</sup> Second, and more importantly, each and every one of the proposed alternative sanctions is rooted in this argument: “*an alternative remedy that accomplishes its deterrent purpose but does not have the effect of excluding reliable evidence would be preferable to the exclusionary rule.*”<sup>130</sup> The fallacy of this argument, however, lies just beneath its surface:

To be sure, if there were no exclusionary rule, unconstitutionally obtained, but “perfectly valid, good and material evidence” would not be suppressed. But if the [F]ourth [A]mendment were enforced by meaningful sanctions other than the exclusionary rule, the same “perfectly valid, good and material evidence” would not be offered to the court. It would not have been unconstitutionally obtained in the first place.<sup>131</sup>

In other words, the criticism that the exclusionary rule should be replaced with a remedy that better deters police misconduct, but at the same time does not harm society by letting a guilty person go unpunished, must be rejected as either fallacious or disingenuous. Why? Because if an alternative remedy did, in fact, effectively deter police misconduct, then the very thing

127. Oaks, *supra* note 26, at 756.

128. Lammon, *supra* note 30, at 1113-14 (multiple citations omitted).

129. Halliburton, *supra* note 16, at 541.

130. Barnett, *supra* note 47, at 942 (emphasis added).

131. Yale Kamisar, “*Comparative Reprehensibility*” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 44 (1987) (citations omitted).

allegedly sought to be avoided would instead be realized: society would be harmed because guilty people would go unpunished. The reason, of course, is that the new remedy deterred the police from violating the suspects' constitutional rights, and therefore the criminal activity was never discovered in the first place. Consequently, criticisms of "the exclusionary rule freeing the guilty seem to be 'less an assault on the exclusionary rule than upon the validity of the *substantive right* sought to be protected by constitutional provisions forbidding unreasonable searches and seizures.'"<sup>132</sup>

Without question, the Fourth Amendment comes with the societal price that more crime will go unpunished than would if we citizens did not have privacy rights.<sup>133</sup> (After all, random warrantless searches of citizens and their homes would undoubtedly expose more criminal activity.) And critics of the exclusionary rule are essentially arguing that we should not have these privacy rights. Their argument, however, comes in the form of an end around; that is, they attack the remedy of exclusion rather than the underlying substantive right. However, by destroying the remedy, the substantive right is reduced to a mere "form of words,"<sup>134</sup> which is essentially the same as abolishing the right itself. Consequently, any argument against the exclusionary rule, regardless of the form it takes, must be seen for what it is in substance: an argument against our right to be free from unreasonable government searches and seizures.

Therefore, instead of limiting, eliminating, or replacing the exclusionary rule, the rule must be viewed as being *inseparable* from the underlying right it protects. This, of course, would also accomplish the goal of preserving (or restoring) the integrity of the judiciary. Further, it would also provide redress to the harmed individual rather than focusing on hypothetical, unidentified citizens that may be victimized by police misconduct at some point in the future.<sup>135</sup> Stated another way,

[T]he exclusionary rule "is just and fair simply because it puts the parties to a criminal prosecution back in the position they would have been had the Constitution been respected." Precedential support for this theory comes from the Supreme Court's decision in *Nix v. Williams*, in which the Court [carved] an exception to the exclusionary rule when the government can show that [it] would

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132. Oaks, *supra* note 26, at 737 (quoting Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 U. ILL. L. REV. 1, 19 (1950)).

133. Kamisar, *supra* note 131, at 45.

134. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

135. *See, e.g.*, Standen, *supra* note 23, at 1443-44 ("Like restitution remedies in general, [the exclusionary rule] is founded on the principle of unjust enrichment. The exclusionary rule requires that the prosecution of a criminal defendant who is a victim of unconstitutional police conduct must proceed without the benefit of its ill-gotten gain . . .").



inevitably have discovered the evidence through legal means . . . . [W]ithout such an exception the government would be worse off than if [its impermissible conduct] had never occurred. At the same time . . . exclusion is fair when it “places the State and the accused in the same positions they would have been in had the impermissible conduct not taken place.”<sup>136</sup>

In short, “the single solution is to restore the remedial vision of the Fourth Amendment through interpretation of the exclusionary rule.”<sup>137</sup> This remedial vision, unlike the Court’s reliance on future deterrence, is “inherently retrospective” and seeks to “restore the accused to a position equal to that which she would have enjoyed but for the intrusion.”<sup>138</sup>

Not only does this proposed remedy address the concerns that have been ignored by the Court’s deterrence-based framework – such as restoring integrity to the judiciary and offering redress to the harmed individual – but it also satisfies a more fundamental concern. That is, “exclusion of evidence is the only form of make-whole relief that exists. . . . [F]idelity to the meaning of the Constitution requires that the [Fourth Amendment] be coupled with a remedy for the individual whose dignity and personal freedom are disregarded by state-empowered law enforcement officers.”<sup>139</sup>

## VI. CONCLUSION

When deciding whether to apply the exclusionary rule as a remedy for Fourth Amendment violations, the Court’s focus on future deterrence is completely misplaced. First and foremost, the economic theory of criminal sanction demonstrates that the potential sanction of excluding ill-gotten evidence

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136. Slobogin, *supra* note 26, at 431-33 (quoting, but criticizing, Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998), and Chief Justice Burger in *Nix v. Williams*, 467 U.S. 431 (1984)).

137. Halliburton, *supra* note 16, at 522. Interestingly, when the roles are reversed and the *government’s* rights are violated, the law focuses on this “remedial vision” to restore the government to its prior position. For example, when a defendant forfeits his right to confront a witness by allegedly preventing a witness from testifying against him, the government not only is permitted to pursue numerous additional felony charges – charges that include obstruction of justice, intimidation of a witness, and bail jumping – but also is allowed to introduce the uncross-examined hearsay statements of the absent witness. *See, e.g.*, *State v. Jensen*, 727 N.W.2d 518 (Wis. 2007). The purpose, of course, is to put the government in the position it would have enjoyed had the defendant not prevented the witness from testifying. *See id.* This, in turn, is the same reasoning that should be employed when the government, through its police officers, commits misconduct of a constitutional dimension against a defendant.

138. Halliburton, *supra* note 16, at 539.

139. *Id.* at 542.

does not, and cannot, deter future police misconduct. Instead, the police will choose to commit the misconduct, and violate a suspect's constitutional rights, because the expected benefits to the police of their misconduct (B) will always exceed the expected costs ( $p \cdot C$ ), where  $p$  = the probability that the evidence will be suppressed, so that  $0 < p < 1$ , and  $C$  = the cost to the police of the lost conviction.<sup>140</sup>

The reason that the exclusionary rule fails to deter is that, while the expected benefits of the misconduct to the police (B) will always be positive, the probability that the ill-gotten evidence will be suppressed ( $p$ ) is near zero.<sup>141</sup> Further, even in the rare case that evidence is suppressed, the cost to the police of the lost conviction (C) is nearly always zero because police tend to value arrests, not convictions; suppression does not necessarily result in a lost conviction; and often the police simply have nothing to lose by committing the misconduct.<sup>142</sup> Finally, there are no effective secondary sanctions to fill the void.<sup>143</sup> Therefore, the expected benefits to the police of their own misconduct will nearly always exceed the expected costs, which equal, or are approaching, zero.

Because the exclusionary rule does not, and cannot, deter police misconduct, the application of the rule should not be limited or in any way affected by the fallacious concept of deterrence. Instead, other important societal concerns previously ignored by the Court – concerns such as the integrity of the judiciary and remedying the individual that was actually harmed by the police misconduct – mandate that the exclusionary rule be viewed as inseparable from the underlying constitutional right it was designed to protect. Consequently, evidence should be excluded from any subsequent criminal trial whenever a citizen's Fourth Amendment rights are violated.<sup>144</sup>

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140. See *supra* Part III.C.

141. See *supra* Part III.C.1.

142. See *supra* Part III.C.2.

143. See *supra* Part III.C.3.

144. See *supra* Part IV.

