DEBUNKING FIVE GREAT MYTHS ABOUT THE FOURTH AMENDMENT EXCLUSIONARY RULE

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I. Introduction

I would like to begin by expressing what a great honor it is to be invited to speak before such a distinguished group of jurists. I especially want to thank Colonel Diner, Lieutenant Colonel Brookhart, and Major Flor for their kind invitation and their support.

While serving as a professor in the Criminal Law Division here more than 20 years ago, I always looked forward to the Judge's Course. This is a special privilege for me to speak with you all today, as I cut my teeth and learned my craft as a trial and appellate counsel appearing before military judges. I must also confess, as a former Government Appellate Division advocate who twice had the privilege of arguing before the then-Army Court of Military Review sitting en banc, I am a bit apprehensive appearing before so many military judges gathered together in one place at one time. But confident in your kindness and judicial temperament, I will press on.

The subject of my talk today will be the Fourth Amendment[1] exclusionary rule. My position, if nothing else, is straightforward and

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* President, Dean, and Professor of Law, Ave Maria School of Law. This article draws from two previous articles by the author, *"The Exclusionary Rule Lottery" Revisited*, 59 CATHOLIC UNIV. L. REV. 747 (2010) [hereinafter "*Lottery Revisited*"], and *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755 (2008) [hereinafter "*Lottery*"]. This speech was presented at the 54th Judges Course at The Judge Advocate Generals School on May 5, 2011. The author is grateful to Professor Ryan Alford, Professor Mark Bonner, and Chief Justice Clifford Taylor for their wise comments and suggestions for an earlier draft of the article. The author is also grateful to Christy Alvey for her outstanding work as a research assistant.

[1] U.S. CONST. amend. IV. The text of the Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text does not specify exclusion as a remedy for Fourth Amendment violations and is, in fact, silent as to remedies in general.

clear: the rule must be rescinded and replaced with an approach under which most if not all evidence obtained as a result of unconstitutional searches and seizures is deemed to be *admissible* at trial, and that police officers who violate the Fourth Amendment should be punished or disciplined, as appropriate. This conclusion is based on my belief that the rule rests on an unprincipled premise; its costs outweigh its presumed and largely illusory benefits; it is ill-suited to accomplish its stated purposes; and it cannot be saved through marginal adjustments, major reforms or sweeping re-conceptualization.

While much can be debated about the Fourth Amendment exclusionary rule, its basic functioning is clear and undisputed: evidence obtained as the result of an unconstitutional search or seizure is suppressed at trial for the purpose of obtaining some broad or attenuated objective regardless of the relevance, necessity and probity of that evidence. The precise benefit or benefits to be achieved by operation of the rule is a matter of dispute, and I will address the subject of the rule's purported benefits a bit later in my talk today.

As contrasted to the rule's ostensible benefits, however, the rule's costs are far more certain and in some respects undeniable, although the precise magnitude of the costs has not been satisfactorily specified.[2] That being said, it seems only fair that the rule's proponents, who necessarily believe that the rule's diffuse and remote benefits outweigh its more immediate and tangible harms, should have the burden of persuasion in defending and justifying the rule. Opponents of the rule, for their part, should be prepared to address and rebut the contentions of the rule's proponents in order to make the case that the rule should not stand. This will be the task of my talk today.

Before one can respond to the rule's proponents, however, one must first state their position and, in particular, the specific justifications they offer for the rule. This is a surprisingly complicated proposition, as

[2] The Supreme Court has said that the exclusionary rule "often frees the guilty." Stone v. Powell, 428 U.S. 465, 490 (1976). Efforts have been made to quantify the magnitude of this social cost. *See, e.g.*, Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: the NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 680, 688 (noting that the percentage of nonconvictions due to illegal searches were significant during the period studied, ranging from 2.8 to 7.1 percent, and the offenses at issue generally were drug offenses rather than violent crimes). Of course, there are a multiplicity of other, less concrete social costs connected with the exclusionary rule.

supporters of the rule do not speak with a uniform voice and may offer several inconsistent and sometimes conflicting justifications for it. Accordingly, and to facilitate my presentation today, I have organized the most common arguments in favor of the exclusionary rule into five major justifications, which I have characterized in an admittedly unflattering fashion as "myths." And so, here are the five great myths in support of the exclusionary rule:

Myth #1: The contemporary exclusionary rule is constitutionally required in order to achieve several objectives, which include but are not limited to deterring future police misconduct.

Myth #2: Even if the rule is not constitutionally required and is intended only to deter future police misconduct, it is justified because it efficiently accomplishes this objective.

Myth #3: Even if the present rule is too inefficient in deterring future police misconduct to justify its application, it can be sufficiently improved in achieving deterrence by a modification that accounts for the seriousness of the crime or the dangerousness of the criminal.

Myth #4: Even if deterrence of future police misconduct in any form is insufficient to justify the rule, the rule's objectives can be expanded to encompass and promote noble aspirations beyond police deterrence, which thereby justify the rule.

Myth #5: In any event, the rule is needed to preserve the integrity of the criminal justice system.

One caveat with respect to the five myths: if I am incorrect as to Myth #1, and the Supreme Court has instead concluded that the exclusionary rule *is* constitutionally required, then the other pragmatic justifications for the rule, which are the subject of Myths #2–#5, are not jurisprudentially needed in its defense. I hope that you will be convinced, at the conclusion of my discussion of Myth #1, that the Supreme Court has disavowed any constitutional basis for the exclusionary rule and thus a discussion of the other myths is warranted. Whether the Court was correct as a matter of law in its rejection of a constitutional basis for the exclusionary rule is beyond the scope of my discussion today.[3]

[3] *See infra* notes 217 & 223 and accompanying text.

I will spend the balance of my time with you responding to the rule's proponents and debunking the five myths I just recited. Before proceeding with this task, however, a little background about the rule is in order.

II. Background

The term "exclusionary rule" is a bit like the lunchmeat spam—virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions. In the broadest sense, the term "exclusionary rule" is imprecise and encompasses several different rules and theories for exclusion based on a variety of factors, such as the type and nature of the government misconduct at issue and the rights thereby transgressed. For example, confessions obtained in violation of the *Miranda* protections[4] and those that are coerced in a traditional sense (such as those obtained by torture and threats[5]) each has its own distinct exclusionary rule. Evidence obtained via illegal searches and seizures that are so egregious as to "shock the conscience" is excluded under a third standard.[6] Other exclusionary rules govern certain Sixth Amendment[7] and Fourteenth Amendment[8] violations. Still others address certain statutory transgressions,[9] including those that violate Article 31 of the Uniform Code of Military Justice.[10] And, I am sure you are all quite familiar with the various constitutional and statutory rules relating to the exclusion of evidence found in the 300 series of the Military Rules of Evidence (MRE),[11] and in particular MRE 311 (pertaining to unlawful searches and seizures)[12] and MRE 321 (pertaining to eyewitness identification).[13]

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[4] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).
[5] Colorado v. Connelly, 479 U.S. 157, 167 (1986); Spano v. New York, 360 U.S. 315, 321–24 (1959).
[6] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).
[7] U.S. CONST. amend. VI; United States v. Henry, 447 U.S. 264 272–74 (1980); Brewer v. Williams, 430 U.S. 387, 400–01 (1977).
[8] U.S. CONST. amend. XIV; *see* Stovall v. Denno, 388 U.S. 293, 294–98 (1967) (some pretrial identifications can be excluded under the Due Process Clause of the Fourteenth Amendment).
[9] *See generally* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 63–82 (1989) (discussing various nonconstitutional rules that have exclusionary rules).
[10] 10 U.S.C. § 831 (2006).
[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].
[12] *Id.* MIL. R. EVID. 311 ("Evidence obtained from unlawful searches and seizures").

As most often used, however, the term "exclusionary rule" pertains to the exclusion of evidence obtained directly or derivatively from illegal searches and seizures in violation of the Fourth Amendment of the U.S. Constitution.[14] This is the version of the exclusionary rule that is the most often invoked,[15] and it is the one that generally first comes to mind for both legal practitioners and the broader public. Accordingly, this is the version of the exclusionary rule that will be the subject of my remarks today. With this brief background as prologue, let the debunking begin.

III. Myth #1: The Contemporary Exclusionary Rule is Constitutionally Required in Order to Achieve Several Objectives, Which Include but Are Not Limited to Deterring Future Police Misconduct

The exclusionary rule was first established by the United States Supreme Court for an ostensibly grand and lofty purpose, i.e., to vindicate the rights of individuals and protect the integrity of the criminal justice system. When the Supreme Court minted the rule in 1914, it instructed that exclusion was integral to the Fourth Amendment's protection against unreasonable searches and seizures.[16] The Court later explained that the rule was of constitutional dimension,[17] observing that without such a rule the Fourth Amendment would be reduced to a mere "form of words,"[18] which would amount to little more than a right

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[13] *Id*. MIL. R. EVID. 321 ("Eyewitness identification").
[14] U.S. CONST. amend. IV.
[15] *See, e.g.*, Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 192 (2010) (predicting that the Fourth Amendment, while remaining the most commonly implicated aspect of the Constitution, may *lose* its status as the most frequently litigated part).
[16] Weeks v. United States, 232 U.S. 383 (1914). A unanimous Court in *Weeks* emphasized the obligation of federal courts and officers to give effect to Fourth Amendment guarantees, suggesting that the essential violation was the invasion of an individual's right of personal security, personal liberty, and private property. Accordingly, the original warrantless search and the trial court's later refusal to return the materials violated Weeks's constitutional rights. *Weeks* was the first criminal case in which the rule was applied. The origin of the rule can be traced to *Boyd v. United States*, 116 U.S. 616, 630 (1886), in which the Court discussed the origins and principles of exclusion in the context of a civil forfeiture case. *See supra* note 1 (stating that the text of the Fourth Amendment is silent as to remedies).
[17] Mapp v. Ohio, 367 U.S. 643, 648, 657 (1961).
[18] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

without a remedy.[19] The Court's elevated justification for the rule was perhaps most eloquently expressed by Justice Louis Brandeis, who wrote that "[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[20] In Brandeis' words, "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."[21] I will return to Justice Brandeis's admonitions in greater detail later in this presentation.

In the years that followed, the Supreme Court reversed direction and stood this soaring rhetoric on its head. More recent Court decisions justifying the exclusionary rule placed increasing emphasis on deterring police misconduct[22] until this instrumental benefit had become the rule's only viable justification.[23] During this same period, the Court, in what can be charitably described as a blinding flash of self-awareness, announced that the rule had been created under its own rule-making auspices rather than being compelled by the Constitution.[24] Accordingly, by the mid-1970s, the exclusionary rule, which had been born as a constitutional imperative resting on a noble and expansive rationale, had been reduced to "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[25] Exclusion was no longer a right of the victim of an illegal search or seizure. It was instead a blunt and unsophisticated mechanism for curbing police misconduct, which accomplishes its objective by threatening the release

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[19] In *Weeks*, the Court wrote that without the exclusionary rule "the 4th Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393.

[20] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[21] *Id.*

[22] *Mapp*, 367 U.S. at 656 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

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

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

[25] United States v. Calandra, 414 U.S. 338, 348 (1974). *Accord* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) ("[T]he [exclusionary] rule is prudential rather than constitutionally mandated.").

of guilty and sometimes dangerous criminals into society if, as Judge Benjamin Cardozo famously put it, "the constable has blundered."[26]

According to the Court's reasoning, because police are "engaged in the often competitive enterprise of ferreting out crime,"[27] the threat that illegally gathered evidence would be excluded will restrain egregious ferreting and cause police to stay within constitutional bounds.[28] The argument is twofold and has aspects of specific and general deterrence. First, with respect to specific deterrence, the particular officer responsible for the misconduct "would be likely to feel aggrieved if her efforts were thwarted by exclusion and that exclusion would accordingly induce her to take greater care in the future."[29] Second, with respect to general deterrence, the repeated and systematic suppression of evidence would promote greater professionalism among law enforcement authorities and improve police practices.[30] The general deterrence claim is undergirded by a belief that is widely understood but generally unspoken: if the public is repeatedly made to suffer the consequences of police misconduct through the freeing of evildoers who avoid an otherwise just conviction and punishment, then its expression of collective fear, outrage and aversion to the harm will deter unlawful police behavior in the future.[31]

This reinvented version of the exclusionary rule is unapologetically instrumental, utilitarian, and blunt. It is instrumental in that the exclusion of evidence is not mandated because this is beneficial for its own sake, compelled by the Constitution, or motivated by some lofty purpose such as preserving the integrity of the judicial process. Rather, exclusion is simply a means to an end: the deterrence of future police misconduct. Any reverential notions relating to judicial integrity as a rationale for the

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[26] People v. Defore, 150 N.E. 585, 587 (1926).
[27] Johnson v. United States, 333 U.S. 10, 14 (1948).
[28] *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (holding that the exclusionary rule's purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").
[29] ANDREW CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS 96 (1993).
[30] *Id*. at 96–97.
[31] *See* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.04[D][2][a], at 380 (4th ed. 2006) (observing that when a "murderer goes free [because evidence is suppressed] people are *less* secure in their persons, houses, papers, and effects").

exclusionary rule are subsumed by a deterrence-based justification.[32] In other words, the costs of exclusion are not borne so as to "enable the judiciary to avoid the taint of partnership in official lawlessness"[33]; rather, they are endured because exclusion is deemed to be the only effective remedy[34] at the disposal of the judiciary[35] to address police misconduct.[36]

The rule is utilitarian in that it is justified on the basis of balancing and choosing the lesser of two harmful outcomes: (1) allowing police misconduct to continue unchecked by the courts, versus (2) undermining the truth-seeking purpose of a criminal trial and permitting some guilty and even dangerous persons to go free.[37] And make no mistake about

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

[33] *Id*. at 357 (Brennan, J., dissenting).

[34] It has repeatedly been argued that the exclusionary rule is the only effective means for deterring police misconduct. *See*, *e.g.*, Mapp v. Ohio, 367 U.S. 643, 652 (1961) (noting "the obvious futility of relegating the Fourth Amendment to the protection of other remedies"); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (describing the exclusionary rule as "the primary instrument for enforcing the [F]ourth [A]mendment"); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) (contending that civil liability will not lie for "the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice"); *id.* at 1386–88 (contending that criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are especially unavailing); Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965) (arguing that "[t]he sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution").

[35] There is a related belief that is sometimes expressed by courts that it rests with the judiciary, as a matter of constitutional design, to curb police excesses via judge-ordered exclusion. *See*, *e.g.*, Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (instructing that the Fourth Amendment protections are "a constraint on the power of the sovereign, not merely on some of its agents"). For an especially evocative expression of the constitutional basis for exclusion premised on a separation-of-powers justification, see State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987) (explaining that in the court's "view, the citizen's right to be free from unreasonable searches and seizures conducted without probable cause is just such a fundamental principle, to be preserved and protected with vigilance. *In our tripartite system of separate governmental powers, the primary responsibility for its preservation is that of the judiciary"*) (emphasis added).

[36] *Mapp*, 367 U.S. at 652.

[37] Pa. Bd. Of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998) (observing "the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application") (internal quotation marks omitted); *see also* United States

it—the truth-seeking purpose of a criminal trial is undermined, both in reality and as a matter of perception, by operation of the exclusionary rule. Indeed, the exclusionary rule obtains its presumed deterrent force from the fact that the exclusion of evidence and its predictable consequences are real evils, which are suffered by the offending officer and the larger community. Let me explain. When wrongdoers are released because of police excesses, this outcome both frustrates the police—who seek to prevent crime and apprehend criminals—and is harmful to the common good. Individuals and society are likewise harmed when the police perform unreasonable searches and seizures, as privacy can be diminished, liberty can be restrained, and property rights can be compromised without sufficient cause. Viewed in this light, the exclusionary rule expresses nothing more than a policy determination based on a cost-benefit analysis: it disincentivizes police misconduct (which is judged to a greater harm) by suppressing its fruits at a criminal trial regardless of their reliability and probity (which is judged to be the lesser harm). Suppression is deemed to be the less damaging alternative even though it may undermine the truth-seeking purpose of the judicial process[38] and allow the guilty to remain unaccountable and go free. This is a starkly utilitarian calculus.

The rule is blunt in application insofar as it is automatic and largely categorical,[39] and is not nuanced in principle or tailored in application.[40] In assessing the harm resulting from suppression, the Court does not

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v. Payner, 447 U.S. 727, 734 (1980) (acknowledging "that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case"); United States v. Havens, 446 U.S. 620, 626–27 (1980) (holding that the incremental furthering of deterrence achieved by forbidding impeachment of the defendant who testifies falsely during proper cross-examination is outweighed by the resulting impairment of the integrity of the fact-finding goals of the criminal trial caused by false testimony).

[38] *See supra* note 37 and *infra* notes 206–07 and accompanying text.

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

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

evaluate the seriousness of the crime[41] or the future dangerousness of the criminal. The value of the evidence at issue to prove guilt is irrelevant.[42] The effectiveness of other methods of deterrence is irrelevant.[43] The fact that the rule promotes cynicism[44] and perjury[45] is irrelevant. And, as already noted, the integrity of the justice system, real and perceived, is also irrelevant. Similarly, the type and magnitude of harm to be avoided via suppression generally does not matter. Whether the officer was a first-time transgressor or recidivist does not matter. Whether he is motivated by a desire to achieve justice or his own self-interest, with some narrow exceptions to be discussed later,[46] does not matter.[47] The egregiousness of the police misconduct, again with only a few exceptions to be discussed later,[48] does not matter.[49] Nothing matters except the

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[41] *Compare* James D. Cameron & Richard Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.D.R. 109, 142–52 (1984) (arguing in favor of a balancing approach to the exclusionary rule), and John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (proposing the abandonment of exclusionary rules in certain specified "serious" cases such as murder and kidnapping), *with* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11–29 (1987) (acknowledging, but rejecting, the proposition that the seriousness of the crime should be considered when determining whether to apply the exclusionary rule).

[42] Stone v. Powell, 428 U.S. 465, 490 (1976) ("[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.").

[43] *See*, *e.g.*, Carol S. Steiker, Response, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 848 (1994) (contending that even though remedies other than exclusion are theoretically preferred, the "exclusionary rule is . . . the best we can realistically do").

[44] *See* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[D][2][b], at 381–83 (noting that to "the public . . . the sight of guilty people going free because reliable evidence that could convict them is suppressed by judges on the basis of a technicality" is repulsive) (internal quotations omitted) (citation omitted).

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

[46] *See infra* notes 55–74 and accompanying text (discussing Herring v. United States, 129 S. Ct. 695 (2009)).

[47] *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 365 (1991) (explaining that the subjective intent of the officer does not matter when evaluating the application of the good faith exception to the exclusionary rule).

[48] *See infra* notes 55–74 and accompanying text (discussing Herring v. United States, 129 S. Ct. 695 (2009).

objective of deterring largely undifferentiated police misconduct at the expense of largely undifferentiated social costs.[50] Considered in this light, using the exclusionary rule to benefit the justice system is a bit like using a pickaxe to repair a wristwatch.

As the just-described narrative convincingly demonstrates, the present-day Fourth Amendment exclusionary rule has been reduced to "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[51] I do not say this as an original thought; rather, I merely repeat what the Court has explicitly written about the rule on multiple occasions.[52] In fact, the language I just quoted is taken from the Supreme Court's 1974 decision of *United States v. Calandra*.[53] Despite these repeated and, I would argue, often unambiguous judicial pronouncements, many still cling to the fiction that the exclusionary rule is constitutionally required, and that its purposes are more expansive than simply deterring future police misconduct.

Any doubt about the Supreme Court's contemporary understanding of the origin and purpose of the Fourth Amendment exclusionary rule was indisputably settled by its recent decision in *Herring v. United States*,[54] decided on January 14, 2009. Bennie Herring traveled to the Coffee County, Alabama, Sheriff's Department to retrieve items from an impounded pickup truck.[55] Mark Anderson, an investigator with the Coffee County Sheriff's Department, asked the department's warrant clerk to check for any outstanding warrants on Herring.[56] The clerk contacted her counterpart at the neighboring Dale County Sheriff's

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

[50] *See* United States v. Scott, 524 U.S. 357, 363 (1998) ("[W]e have held [the 'Exclusionary Rule'] to be applicable only where its deterrence [of police misconduct] outweigh[s] its "'substantial social costs.'"). To be fair, some proponents of the rule may concede that many or all of the above factors are technically relevant but nevertheless substantially outweighed by the imperative of deterring future police misconduct. *See, e.g.*, Steiker, *supra* note 43, at 848–52.

[51] United States v. Calandra, 414 U.S. 338, 348 (1974). *Accord Scott*, 524 U.S. at 363 ("[T]he [exclusionary] rule is prudential rather than constitutionally mandated.").

[52] *See, e.g.*, *Herring*, 129 S. Ct. at 699; Hudson v. Michigan, 547 U.S. 586, 591 (2006); Illinois v. Krull, 480 U.S. 340, 347 (1987); Stone v, Powell, 428 U.S. 465, 487 (1976).

[53] 414 U.S. at 348.

[54] 129 S. Ct. 695.

[55] *Id.* at 698.

[56] *Id*.

Department, who informed her that Herring had an outstanding warrant.[57] Within fifteen minutes, the Dale County clerk called back to advise the Coffee County sheriff's department that there had been a clerical mistake and Herring's warrant had been recalled five months earlier.[58] But by then it was too late, as Anderson had already arrested Herring and searched his vehicle, finding and seizing firearms and methamphetamines that were discovered inside.[59]

Herring was indicted in the U.S. District Court, Middle District of Alabama, for the crimes of felon in possession of firearms[60] and possession of a controlled substance.[61] He invoked the Fourth Amendment exclusionary rule to suppress the evidence seized from his vehicle, claiming that his arrest and derivative search of his truck were unlawful because they were based on an invalid and recalled warrant transmitted by police authorities in a neighboring county.[62] The motion was denied by the trial court and Herring was convicted.[63] The Court of Appeals affirmed, ruling that the evidence was admissible because the mistake relating to the warrant was made by police officials in a different county, the error was promptly corrected, and there was no evidence of a reoccurring problem or pattern of error.[64] Thereafter, the Supreme Court granted certiorari.[65]

The Supreme Court's decision in *Herring* is instructive for several reasons.[66] First, it explicitly and categorically re-affirms that the sole justification for the exclusionary rule is its presumed capacity to deter future police misconduct. In *Herring*, the Supreme Court observes that

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[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] 18 U.S.C. § 922(g)(1) (2006).
[61] 21 U.S.C. § 844(a) (2006).
[62] *Herring*, 129 S. Ct. at 699.
[63] *Id*. (citing United States v. Herring, 451 F. Supp. 2d 1290 (2005)).
[64] *Id.* (citing United States v. Herring, 492 F.3d 1212 (11th Cir. 2007)). The circuit court relied heavily on United States v. Leon, 468 U.S. 897 (1984), which established the good faith exception to the exclusionary rule.
[65] *Herring*, 492 F.3d 1212 (11th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3438 (U.S. Feb. 19, 2008) (No. 07-513).
[66] One caveat seems in order. *Herring* is a 5 to 4 decision. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg wrote the dissenting opinion, joined by Justices Stevens, Souter, and Breyer. Irrespective of the principle of *stare decisis*, it is possible that the Court's approach to the exclusionary rule could change, perhaps even dramatically, with a change in the composition of the Court.

"[w]e have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead, we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[67] The Court further elaborates:

> Justice Ginsburg's dissent [in *Herring*] champions what she describes as a more majestic conception of . . . the exclusionary rule, which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.[68]

Second, *Herring* reflects some sensitivity to the criticism that the exclusionary rule is too blunt and crude by incorporating an evaluation of the type of police misconduct at issue, i.e., the harm to be deterred. The Court's assessment has two aspects: (1) what the Court calls the "nature" of the police misconduct, and (2) what it refers to as the "gravity" of the harm. With regard to the nature of the misconduct, *Herring* suggests that exclusion should be reserved for law-enforcement illegality that is flagrant, intentional or sufficiently deliberate.[69] The Court instructs that this limitation does not detract from the rule's purpose because "the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[70] According to the Court, police misconduct not rising to this level of egregiousness, such as an isolated occurrence or negligent misconduct, may not justify the costs of exclusion.[71]

With regard to the gravity of the harm, the Court explains that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct."[72] In the Court's words, the police misconduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice

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[67] *Herring*, 129 S. Ct. at 700 (citations omitted).
[68] *Id*. at 700 n.2 (citations and internal quotation marks omitted).
[69] *Id.* at 701–03.
[70] *Id.* at 702.
[71] *See* Heffernan & Lovely, *supra* note 47, at 332–45 (arguing that most violations of the Fourth Amendment involve a good faith misunderstanding of the law or misinterpretation of the facts by the police).
[72] *Herring*, 129 S. Ct. at 701.

system."[73] Put another way, in order for the exclusion of evidence and its consequences to be a lesser evil in the Court's deterrence calculus, the police misconduct to be deterred must be sufficiently blameworthy. Otherwise, the benefit of deterring minimally offensive misconduct is not worth the social cost of excluding an undifferentiated range of probative and reliable evidence of guilt.

Although the evaluation of competing harms in *Herring* is perhaps more refined and exacting than previously undertaken by the Court, it is not the first occasion in which the Court has declined to exclude evidence when the illegal search or seizure that produced it fell short of deliberate police misconduct.[74] In *United States v. Leon*,[75] the Court first recognized the "good faith" exception to the exclusionary rule, deciding that evidence need not be excluded when the police act in good faith in reliance upon a facially valid warrant that was later determined to be invalid.[76] In *Massachusetts v. Sheppard*,[77] the Court applied the good faith exception when the police relied upon a warrant that was invalid because a judge forgot to make "clerical corrections."[78] In *Illinois v.*

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[73] *Id.* at 702. The exclusionary rule can be more easily countenanced by referring to the "price paid by the *justice system*," thereby suggesting that the only victim of the exclusionary rule is an impersonal, faceless, and monolithic bureaucracy or process. Of course, the justice system, and therefore the common good, suffers when guilty criminals are released without punishment. Real people also suffer—widows, orphans, rape survivors, molestation victims, drug addicts, and others. The "justice system" language obscures the many discrete victims of the exclusionary rule and unfairly minimizes its costs.

[74] *E.g.*, United States v. Ceccolini, 435 U.S. 268, 274–75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a "*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment," based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs); Stone v. Powell, 428 U.S. 465, 494–95 (1976) (holding the exclusionary rule does not apply in federal habeas corpus proceedings because the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context); Alderman v. United States, 394 U.S. 165, 174 (1969) (holding Fourth Amendment rights cannot be vicariously asserted based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs). In each of these cases, the assumed benefit of deterring future police misconduct is balanced against the social cost of excluding probative evidence of guilt. In each case, the advantages of significant deterrence is deemed to outweigh the burdens of suppression, while the benefits of more attenuated deterrence is determined to be insufficient to outweigh these costs.

[75] 468 U.S. 897 (1984).

[76] *Id.* at 922.

[77] 468 U.S. 981 (1984).

[78] *Id*. at 991.

Krull,[79] the Court applied the good faith exception when the police relied on a statute that was later declared to be unconstitutional.[80] And finally, in *Arizona v. Evans*,[81] the Court applied the good faith exception when the police relied on mistaken information in a database prepared by a court employee.[82] In each of these cases, the police acted in conformity with and under the authority of a facially valid court document (such as a warrant or database) or a statute, which is precisely the type of conduct that the exclusionary rule seeks to encourage rather than deter. The Court has reasoned that in such circumstances, suppression would gratuitously punish the police[83] and be clearly outweighed by countervailing social costs. According to the Court, any need for deterrence for judges, court employees, and legislators, in order to promote compliance with the Fourth Amendment, can be accomplished by means other than the exclusionary rule.

Unlike these earlier cases, however, the Fourth Amendment violation in *Herring* originated with police officials, albeit from a neighboring county. Thus, and for the first time, the Court was willing to balance away police misconduct premised on an error attributable to the *police* in applying the good faith exception to avoid the remedy of exclusion. While the significance and future impact of the *Herring* decision remains a matter of debate,[84] it is clear that the case unequivocally reiterates that the exclusionary rule is not constitutionally required, and deterrence of future police misconduct is the *raison d'être* for the modern exclusionary

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[79] 480 U.S. 340 (1987).
[80] *Id*. at 349–50.
[81] 514 U.S. 1 (1995).
[82] *Id*. at 15.
[83] *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that the exclusionary rule "was inapplicable" for evidence obtained after a knock-and-announce violation because the interests violated by the abrupt entry of the police "have nothing to do with the seizure of the evidence"); United States v. Ramirez, 523 U.S. 65 (1998) (instructing that the "destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression," *id.* at 71, and, had the breaking of the window been unreasonable, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.* at 72 n.3).
[84] *Compare* Tom Goldstein, The Surpassing Significance of Herring, SCOTUSBLOG, (January 14, 2009), *available at* http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/ (describing Herring as a "significant shift in the Court's jurisprudence"), *with* Orin Kerr, Responding to Tom Goldstein on *Herring*, *available at* http://www.volokh.com/posts/1231961926.shtml (describing *Herring* as a "minor case").

rule.[85] And, even if one approves of *Herring*'s attempt to make the exclusionary rule a little less categorical, the fact remains that the Supreme Court in that case nevertheless failed to address in any meaningful or comprehensive fashion the philosophical and prudential problems associated with an instrumental, utilitarian, and blunt policy initiative created and administered by courts in the guise of constitutional interpretation.

IV. Myth #2: Even If the Rule Is Not Constitutionally Required and Is Intended Only to Deter Future Police Misconduct, It Is Justified Because It Efficiently Accomplishes This Objective

I will begin the debunking of this myth by posing a hypothetical. Everyone would undoubtedly agree that reducing the time needed for firefighters to respond to calls at residences has important societal benefits. Among these are saving lives, preventing injury, and avoiding property damage. When vehicles are illegally parked near fire hydrants or in fire lanes, they can impede firefighters and thereby increase response time. To address the problem of these types of obstructions, legislation is proposed whereby the local fire department would deliberately delay for ten minutes responding to fires at the residences of those people who have previously been ticketed and convicted for this type of parking violation. In support of this approach, it is argued that the proposed legislation would reduce the aggregate response time for all residential fires because it would deter people from obstructing hydrants and fire lanes. In other words, the harm suffered by occasional ten-minute delays in responding to fires at the residences of violators would be more than offset by the increased overall efficiency achieved in responding to all residential fires, because the deterrence of certain types of parking violations would lead to less obstructions that might delay firefighters.[86]

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[85] It is possible, of course, that even if deterrence is the only justification offered for the court-made exclusionary rule, the rule could nevertheless help achieve other, unintended benefits. This is a corollary to the point about unintended consequences discussed *infra*, note 161, which is addressed here in the context of Myth # IV.

[86] Taking it a step further, I suppose a proponent of the proposed legislation might even consider arguing that if in a particular case the fire department unreasonably destroys or damages vehicles parked near hydrants or in fire lanes while engaged in the often competitive exercise of extinguishing fires, they ought to be deterred in the future from profiting from this type of misconduct through the deliberate burning down of the residences they would not have saved but for their unreasonable destruction or damaging of vehicles.

Assume further that you are a lawmaker who will be asked to vote on this legislation. No doubt, you are first confronted with the proposition of whether the law should deliberately impose harm on some people in order to achieve a collective good for all, which incidentally is akin to a normative question implicated by a deterrence-based Fourth Amendment exclusionary rule. In regard to this question, I would briefly note that the approach in the fire department hypothetical might be seen as less morally problematic than a deterrence-based exclusionary rule. This is because in the hypothetical, the people harmed by the deliberate delay in fire-department services are singled out because of their misconduct (their parking violations). In contrast, it is the public at large who are harmed by the release of dangerous criminals under the exclusionary rule, and this harm is inflicted upon the general public in response to misconduct for which they have no responsibility.

Leaving this moral issue aside, however, as a legislator you wish to evaluate the proposed statute on the basis of whether it will achieve the utilitarian benefit of enhancing overall response time. In support of the proposed rule, you would of course expect that its proponents would present persuasive empirical evidence to show that it would efficiently achieve its objective. Certainly no responsible decision-maker would accept the utility proposition that ostensibly justifies this proposed rule as a matter of faith or abstraction. Quite to the contrary, when the objective of a rule is to enhance utility through the comparison of competing costs and benefits, it is especially apropos and should be expected that the rule would be supported by convincing empirical evidence. In the absence of such evidence, I submit that it would be irresponsible to endorse or implement such a rule.

One would expect the same type of empirical support to have been marshaled for the present-day Fourth Amendment exclusionary rule insofar as it, like the hypothetical rule just described, is justified by balancing competing harms and benefits to achieve aggregate utility. It is astounding, therefore, that even after decades since its inception, the deterrence arguments in support of the exclusionary rule have never been empirically verified. Indeed, Professor Dallin Oaks, who performed what is widely recognized as the "[t]he most comprehensive study on the exclusionary rule,"[87] concluded that his research "obviously fall[s] short

[87] California v. Minjares, 443 U.S. 916, 926 (1979) (Rehnquist, J., dissenting from a denial of a stay) (referring to Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 CHI. L. REV. 665 (1970)).

of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[88] Other studies likewise fail to demonstrate that the exclusionary rule deters police misconduct and, in fact, they generally suggest the contrary.[89] Judge Richard Posner concurs that "[n]o one actually knows how effective the exclusionary rule is as a deterrent,"[90] and Professor Roger Dworkin has written that deterrence-based arguments in support of the rule are made "largely [as] a matter of faith."[91]

More than this, many proponents of the exclusionary rule candidly concede that its deterrence-based claims are, for all practical purposes, unverifiable. Professor Yale Kamisar, one of the most respected supporters of the exclusionary rule, acknowledges that such justifications for the rule involve "measuring imponderables and comparing incommensurables."[92] Others have lamented that "there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule."[93]

One can speculate about the reasons for the dearth of empirical support for the rule and the willingness of courts and others to prop up and perpetuate the rule in the absence of any convincing data. It might be the case that the Supreme Court is not especially concerned about the

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[88] Oaks, *supra* note 87, at 709. In a postscript to the study, Oaks observes that his self-described "polemic on the rule . . . brushes past the uncertainties identified [in] the discussion of the data." *Id.* at 755.

[89] *E.g.*, Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUS. ST. U. CRIM. JUST. CENTER RES. BULL. 1 (1986); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973) (both suggesting that the exclusionary rule does not and cannot function as a meaningful deterrent for future police misconduct).

[90] Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

[91] Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 INDIANA L.J. 329, 333 (1973).

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

[93] Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740, 763–64 (1974). *See also* Stone v. Powell, 428 U.S. 465, 492 & n.32 (acknowledging the past "absence of supportive empirical evidence" for the exclusionary rule and describing recent empirical studies of the exclusionary rule as "inconclusive").

factual basis for its policy pronouncements.[94] It might instead be the case that courts are particularly incapable of engaging in the type of empirical fact finding used for making public policy, which should be reserved to the elected branches of government because of their competence, resources, and political authority.[95] But it remains likewise true that legislators and academics have been equally incapable of providing a solid empirical basis for the assumptions about police deterrence that have been repeatedly advanced to justify the exclusionary rule.

> It should also be considered that there are powerful countervailing considerations that weaken the unverifiable assumption that the exclusionary rule meaningfully deters future police misconduct. First, a police officer's violation of the Fourth Amendment, more likely than not, is unintended and lacks malice, and thus is unlikely to be deterred by the threat of suppression.[96] Second, even in the case of deliberate violations, the sanction of exclusion is often too remote and attenuated to achieve meaningful deterrence.[97] Third, many of the most problematic searches and seizures are never judicially reviewed precisely because they are problematic; often such cases are buried by the police and possible suppression motions are bargained

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[94] *See Stone*, 428 U.S. at 492 (wherein the Court noted a lack of empirical evidence to support its premise that the exclusionary rule deters police misconduct).

[95] *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (indicating that Congress is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."); Oregon v. Mitchell, 400 U.S. 112, 247–48 (1970) (Brennan, J., concurring in part and dissenting in part) (acknowledging that "[t]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions" in comparison with the role of the legislature); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 575 (1994) (recognizing that "[c]ourts are supposed to use moderation in reviewing decisions of the lawmaking body in order to avoid engaging in policymaking, because determining policy is not a function allocated to the judicial branch," particularly when the judge is appointed and not elected); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINCINNATI L. REV. 199, 209 (1971) (stating that the legislature is a better fact-finding institution than the court system for making laws because it has greater familiarity with "current social and economic conditions"); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323 (1987) (noting that "politically responsive officials are in a better position" to evaluate facts and policies for lawmaking purposes, and therefore courts should "abstain and defer to the legislature" to fulfill that role).

[96] *See* Heffernan & Lovely, *supra* note 47, at 365.

[97] 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[C], at 376.

> away as part of guilty plea arrangements.[98] Fourth, police officers—especially the malicious officers who are the best candidates for deterrence—may lie to avoid suppression.[99] Fifth, even where suppression is ordered, it often occurs long after the wrongful conduct has taken place and this sanction may never be communicated to the offending officer.[100] Sixth, some officers may intentionally violate the Fourth Amendment because they conclude that the incentives for conducting illegal searches and seizures—such as the suspect's arrest and indictment, loss of employment, deportation, confiscation of property, deprivation of privacy and liberty, and so forth—outweigh the disincentive of the possible future suppression of evidence.[101] Finally, the police can game the rule to shield their misconduct from suppression, such as by exploiting the standing requirements imposed on defendants.[102]

In particular, it seems likely that any presumed deterrent benefit gained by excluding illegally obtained evidence would be undermined by the way in which suppression decisions are typically made and announced. Usually before a motion to suppress is litigated, law enforcement officials and prosecutors have reviewed the matter and concluded that no constitutional violation has occurred. If a judge thereafter suppresses the evidence, the police and the public might simply conclude that the prosecutor was correct and the judge got it wrong. Moreover, when the suppression of evidence is ordered or affirmed on appeal, especially by a divided court, the community in general and police officers in particular may believe that the dissenting judges or justices were correct and the conduct by the police was legal. Indeed, the public and the specific officers involved may never actually learn of the court's decision or its rationale for suppressing evidence,

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[98] *Id.*

[99] *See* PIZZI, *supra* note 45, at 38–39.

[100] 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[C], at 376.

[101] *Id.*

[102] *See* Alderman v. United States, 394 U.S. 165, 174 (1969) (holding Fourth Amendment rights cannot be vicariously asserted). The Court no longer treats the issue of standing separately from the merits of a suspect's Fourth Amendment claims. Rakas v. Illinois, 439 U.S. 128, 138–39 (1978). Thus, in the case of a contested search, the Court would simply ask whether the suspect had an expectation of privacy in the area searched by the police. *See* Katz v. United States, 389 U.S. 347, 350–51 (1967) (holding that the Fourth Amendment protects against certain intrusions upon expectations of privacy).

and, if they do, this notification can occur years later and in a summarized and perhaps distorted fashion. For all of these additional reasons, the unverifiable claims of deterrence should be viewed with even greater caution.

Using the same type of speculative philosophizing as the rule's proponents employ—and admittedly pushing the envelope a bit to make a point—I suppose one could even argue that in the short term we ought to encourage *more* illegal searches and seizures by the police, as this would deter people from committing crimes. The rationale would go like this: More aggressive searching and seizing by the police will lead to less crime. Once the crime rate has declined to a specified tipping point, police would have less crime to investigate and, therefore, there would be less illegal searching and seizing going on. While all of us would no doubt reject such reasoning as wrong-headed and speculative, we should pause to consider whether such an approach is really so different in kind than the current thinking that passes as a pragmatic justification for the exclusionary rule for the deterrence advocates.

In summary, one must candidly accept that the deterrence claims upon which the exclusionary rule rests have not and probably cannot be empirically verified. In his regard, I am reminded of a scene from the great John Ford Western movie, *The Man Who Shot Liberty Valance*.[103] Without giving away too much of the plot, near the end of the film the Jimmy Stewart character, a lawyer and later United States Senator named Ransom Stoddard, tells a newspaper editor the true story about the death years earlier of an infamous outlaw named Liberty Valance, played by Lee Marvin. A legend had grown up about how Valance had died, which departs substantially from the actual events being related to the editor by Senator Stoddard. It was upon the false legend of Valance's death that Senator Stoddard had built his career and, indeed, the history of the West was irrevocably shaped. When Senator Stoddard finishes describing what had really happened, the editor abruptly destroyed his notes, explaining, "This is the West, sir. When the legend becomes fact, print the legend."

The legend of deterrence—the myth of deterrence, if you will—has been accepted as fact without verification. It has been printed and reprinted by the courts and others as an article of faith. It is astounding that the pseudo-empirical claim that justifies the present-day exclusionary rule can rest on what amounts to little more than surmises

[103] THE MAN WHO SHOT LIBERTY VALENCE (Paramount Pictures 1980).

and speculation. Indeed, the rule's proponents have conceded that they have failed to support their position with facts and have asked to be relieved of the burden of persuasion. Given all that is at stake, including the harmful and tangible consequences of the exclusionary rule, we should expect and insist upon much more.

V. Myth #3: Even if the Present Rule Is Too Inefficient in Deterring Future Police Misconduct to Justify its Application, It Can Be Sufficiently Improved in Achieving Deterrence by a Modification that Accounts for the Seriousness of the Crime or the Dangerousness of the Criminal

Some proponents contend that the present instrumental and utilitarian exclusionary rule can better realize its assumed deterrent benefits, while reducing countervailing costs, if the seriousness of the crime or the future dangerousness of the criminal were factored into the calculation of whether to suppress evidence. These proponents would, presumably, welcome the Court's efforts in *Herring* to refine the rule to account in some albeit limited fashion for the nature and gravity of the police misconduct.[104] They would additionally urge, however, that the Court should create a more robust and nuanced exclusionary calculus, which would better achieve desired deterrence while reducing exclusion and thereby achieving greater utility.

The argument to reduce unnecessary or too-costly exclusion based on pragmatic variables is not new. Professor Kamisar, although opposing such modifications to the exclusionary rule, has coined the phrase "'comparative reprehensibility' approach"[105] to describe what is an ostensibly more refined equation for evaluating proportional harms in deciding whether to suppress evidence obtained in violation of the Fourth Amendment. Many variations of the comparative reprehensibility approach have been proposed. Professor John Kaplan, for one, would carve out an exception to the exclusionary rule for certain serious offenses.[106] Professor William Plumb would recognize an exception for other heinous crimes, explaining that:

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[104] *See supra* notes 69–73 and accompanying text.
[105] Kamisar, *supra* note 92, at 2.
[106] Kaplan, *supra* note 41, at 1046 (contending that the exclusionary rule should not be applied in the case of "treason, espionage, murder, armed robbery and kidnapping by organized groups").

> [I]f the application of the [exclusionary] rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth, and if a murderer, bank robber, or kidnapper should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws.[107]

Other commentators prefer a two-tiered approach, exempting certain serious cases from the exclusionary rule's reach while balancing the gravity of the unconstitutional police behavior against the magnitude of the crime to determine whether to exclude evidence in less egregious circumstances.[108] Some, who would exempt only a limited number of offenses from the exclusionary rule's reach, would also create an exception to the exemption to account for police misconduct that is so flagrant as to "shock the conscience."[109] Similarly proposed refinements of the exclusionary rule include the so-called "inadvertence" exception,[110] the "substantiality" test,[111] and the "proportionality" basis.[112] Consistent with this line of thinking, Australia has adopted a discretionary exclusionary rule, which requires the trial judge to weigh two competing considerations against each other in deciding whether to suppress evidence: "[1] the desirable goal of bringing to conviction the wrongdoer and [2] the undesirable effect of curial approval, or even

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[107] William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939) (footnotes omitted).

[108] Cameron & Lustiger, *supra* note 41, at 142–52.

[109] Kaplan, for one, argues that "some police violations would still invoke the exclusionary rule" even in the case of serious felonies that would otherwise be exempted. Kaplan, *supra* note 41, at 1046 (citing Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding suppression is required when the police misconduct is so egregious as to "shock the conscience")).

[110] *Id.* at 1044 (observing that "[o]ne superficially tempting modification would be to hold the [exclusionary] rule inapplicable where the constitutional violation by the police officer was inadvertent"). Arguably, this could be the import of the recent *Herring* decision. *See supra* note 85 and accompanying text.

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

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

encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."[113]

The comparative reprehensibility approach and its analogues are sensibly motivated. If one accepts that the exclusionary rule is designed to obtain benefits while minimizing harm, then it seems only fair within this context to evaluate the relative harm caused by suppressing evidence as compared to the damage caused by admitting it. This type of assessment, however, necessarily begs the predicate question of which is generally more damaging to society: the misconduct by the police officer or the criminal activity of the suspect? Leaving aside on the one hand cases that involve especially abusive police activities that "shock the conscience"[114] and thus might deny due process,[115] and on the other certain petty crimes and minor *malum prohibitum* offenses, the self-evident answer is that the crime is almost always more harmful than the unreasonable search or seizure used to gather evidence to prosecute it, and the unpunished criminal is almost always more dangerous to society than the undeterred policeman who improperly gathered evidence of his guilt.[116] As Dean John Wigmore put it over eighty years ago, the exclusionary rule places courts "in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It

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[113] Craig Bradley, *Criminal Procedure in the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99, 110 (1990) (quotations and citations omitted); *see* Frank Bates, *Improperly Obtained Evidence and Public Policy: An Australian Perspective*, 43 INT'L & COMP. L.Q. 379 (1994); *see generally* Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia*, 29 INT'L & COMP. L.Q. 664 (1980) (comparing and contrasting the discretionary aspects of the exclusionary rule in England, Canada and Australia).

[114] *Rochin*, 342 U.S. at 209.

[115] U.S. Const. amend XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No claim is made that every shocking episode of police misconduct necessarily denies due process. Such a determination would presumably turn, in part, on one's tolerance for or expectation of police excess, at least in the absence of a judicial standard for classifying constitutionally-based degrees of conscious-shocking behavior.

[116] To be clear, this observation should not be taken as an endorsement of consequentialism. It is simply a critique of the Court's exclusionary rule on its own terms.

regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer."[117]

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

> [T]he decision whether to suppress could not be made before the merits of the suppression issue are litigated. To do so beforehand would be premature, as the exclusion of probative evidence could not be ordered unless and until it can be premised on a judicial finding that the police conduct was unconstitutional. Likewise, it appears obvious that the suppression decision would have to be made randomly or based on criteria unknown to the police at the time when they are participating in a search or seizure. If the ultimate suppression decision was made in relation to factors known by the police before they act—such as the seriousness or the crime or the dangerousness of the suspect—the same assumptions that underlie the exclusionary rule could prompt the police to adjust their conduct and risk the possible exclusion of evidence because of the urgent need to apprehend a particularly dangerous offender. This would undermine the goal of police deterrence that the rule seeks to achieve.[118]

Professor Craig Bradley agrees that although a mandatory and categorical rule is not necessary for deterrence in an abstract sense, it is required to achieve meaningful deterrence as a practical matter. Bradley explains:

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

[118] Milhizer, *Lottery*, *supra* note [*], at 762.

> [i]f the police *knew* that the evidence would be excluded, for example, two-thirds of the time, they would likely be just as deterred from illegal searches as they are now. The trouble with this approach is that it has to be random. Otherwise, whatever the standards, the police will learn them and adjust their conduct accordingly.[119]

There is another fundamental problem with the "'comparative reprehensibility' approach," at least in its unadulterated form. As Dean Wigmore noted, the reprehensibility of criminals and their crimes almost always exceeds that of the police officers and their misconduct. Accordingly, when these competing evils are balanced against each other in individual cases, the expected outcome will be that the illegally obtained evidence will be admitted. Ironically, in cases involving especially serious crimes in which the deterrence of police misconduct is presumably most needed, a "comparative reprehensibility approach" would increase police confidence that the evidence they gathered would not later be suppressed. A presumptive default to allow the introduction of illegally obtained evidence, either generally in specific types of cases, would inevitably nullify any deterrent benefit that the exclusionary rule might otherwise achieve. This would result in a symbolic but impotent exclusionary rule that would defeat the rule's justifying purpose of deterring future police misconduct. It would also undermine possible legislative and executive initiatives that might address police misconduct in more effective ways.

The conclusion is inescapable: marginal tinkering with the exclusionary rule so that it more efficiently deters police misconduct will not produce a satisfying result and is ultimately doomed to failure. The rule's very design of influencing future police misconduct through the deliberate avoidance of the risk of exclusion is necessarily undermined if the police can calibrate their behavior to circumvent this risk while engaging in misconduct. The only possibility for systematically reducing the amount of evidence suppressed while retaining a comparable deterrent benefit from suppression would involve random decision making by the courts, such as a lottery for determining when illegally obtained evidence is excluded.[120] Of course, any indiscriminate process

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[119] Bradley, *supra* note 113, at 123 (emphasis in original).

[120] Milhizer, *Lottery*, *supra* note [*], at 762 (describing a "straw-man" exclusion lottery to illustrate the utilitarian nature of the rule).

for deciding suppression motions would be summarily rejected because it is too blatantly unprincipled, among other reasons. Further, an approach that bases the suppression decision on a systematic comparison of the proportional reprehensibility of criminal and police misconduct would result, for all practical purposes, in an exclusionary rule in name only, as illegally obtained evidence would be rarely excluded and the police would have prior knowledge of this likely outcome. A toothless exclusionary rule can do great harm, as it would hold out the false promise of deterrence while masking the need engage in reform that effectively addresses police misconduct. Accordingly, the present deterrent-based exclusionary rule, as bad as it is, cannot be effectively reformed to incorporate a meaningful proportionality of harm analysis.

VI. Myth #4: Even if Deterrence of Future Police Misconduct in Any Form Is Insufficient to Justify the Rule, the Rule's Objectives Can Be Expanded to Encompass and Promote Noble Aspirations Beyond Police Deterrence, Which Thereby Justify the Rule

Given the insurmountable problems with reforming a deterrent-based exclusionary rule to obtain greater utility, the next logical question is whether a more encompassing rule might be crafted to account for the ostensibly "noble" benefits of excluding illegally obtained evidence. Some contend that exclusionary rule critics fail to consider the rule's full "majesty."[121] As we have already discussed, such lofty rationales for the rule have been rendered purely academic by the Court in its decisions such as *Herring*. But it is worthwhile to take up the academic question and thus confront the fourth great myth: that the incorporation of the exclusionary rule's more noble aspirations would justify its continued use.

As mentioned earlier, those who argue in favor of the noble and majestic exclusionary rule contend in some general sense that the systematic suppression of unconstitutionally obtained evidence would enhance the integrity and efficacy of the justice system[122] and achieve other related benefits. Many of these proponents recite the considerations expressed in Justice Brandeis' admonition in the *Olmstead* case, which

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[121] *See* Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsberg, J., dissenting) (describing "a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule") (internal quotations omitted).

[122] *Supra* notes 16–21 and accompanying text.

describes a more expansive rationale for excluding evidence obtained as a result of police misconduct. As quoted earlier, Brandeis famously asserts that the admission of illegally obtained evidence, as would occur in the absence of the exclusionary rule, would "breed[] contempt for the law," "invite[] anarchy," and "bring terrible retribution."[123] It is for these reasons among others, Brandeis argues, that the suppression of even reliable and probative evidence is justified.[124] To tolerate the admission of illegally obtained evidence at a criminal trial, Brandeis evocatively concludes, would be to endorse the proposition that "the end justifies the means."[125]

Before addressing the specific evils Brandeis recites, it is useful first to confront his over-arching critique about "end[s] justif[ying] the means."[126] Stripped of its rhetorical flourishes, the truth is that Brandeis's justification for the exclusionary rule rests on the same type of ends/means relationship that he so enthusiastically criticizes in defense of the rule's more noble purposes. The only difference between Brandeis's position and the present deterrence-based rule is that Brandeis seeks a more expansive utilitarian end, albeit using the same utilitarian means. Let me explain.

The present Supreme Court jurisprudence, as previously discussed, endorses the suppression of unconstitutionally obtained evidence (the means) in order to deter future police misconduct (the end). Brandeis instead supports the suppression of unconstitutionally obtained evidence (the same means) in order to enhance respect for the law (an additional end), promote good order in society (an additional end), and avoid retribution (an additional end). In theory, nothing would prevent combining the Court's objective of deterring police misconduct with

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[123] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[124] To be fair, Justice Brandeis' dissent in *Olmstead* is not limited to a narrow concern for police abuses; it also includes a more extensive argument that the exclusionary rule is constitutionally required for the rebalancing of the powers between the federal government and the citizen. Nevertheless, it is Brandeis' colorful rhetoric about police misconduct—and the resulting contempt for the law, anarchy, and retribution that this would cause—for which he is best remembered by exclusionary rule proponents. To put in context the broad influence of Brandeis' soaring rhetoric in *Olmstead*, a Google search of his opinion produces 220,000 results, while a similar search of Justice Stewart's more recent, iconic concurrence in *Jacobellis v. Ohio*, which refers to "know[ing] pornography when I see it," produced only 74,900 results. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[125] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[126] *Id.*

Brandeis's ostensibly nobler goals to formulate a more comprehensive utilitarian approach for determining whether to suppress evidence, which calibrates how much exclusion (the means) is necessary to achieve the full range of desired ends, noble or otherwise. Arguably, this is exactly what the Court did years ago in its well-known decision in *Mapp v. Ohio*.[127] Any championing of Brandeis's reasoning because it advocates a nobler means (as opposed to nobler ends) is thus fundamentally misguided. In final analysis, Brandeis' admonition about the evils that would be visited by eliminating the exclusionary rule is simply a call for a more robust set of variables to be evaluated when fashioning a more encompassing but nevertheless utilitarian-based exclusionary rule.

But it is even worse than this. Brandeis's justification for the exclusionary rule rests on the same type of "bad means"/"good ends" instrumentalism that he is so willing to roundly condemn and attribute to his opponents. According to Brandeis, to allow the admission of tainted evidence (bad means) to secure the conviction of a guilty person (good ends) would endorse a corrupt form of instrumentalism. Brandeis's alternative—that we should suffer having dangerous criminals go free (bad means) in order to coerce police into behaving lawfully for a variety of noble reasons (good ends)—embraces the identical moral infirmity to which he objects. The exclusionary rule, as conceived by Brandeis, is every bit as accepting of the proposition that good ends can justify bad means.[128]

With these limitations in mind, we can now turn to Brandeis' first contention that the admission of illegally obtained evidence would "breed[] contempt for the law."[129] The argument seems premised on the following syllogism: (1) permitting the reception of evidence at trial indicates not only that the evidence is reliable, probative and relevant, but also it signals that courts encourage or condone the methods used to obtain the evidence; (2) courts should not encourage or condone illegal police conduct; and, therefore, (3) the reception of illegally obtained evidence signals that courts encourage or condone police misconduct. Further, because the courts are rightfully viewed by society as a guardian of justice and the law's legitimacy, their willingness to receive illegally

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[127] 367 U.S. 643, 655–56 (1961).

[128] In the quoted passage, Brandeis also refers to a "private criminal." *Id.* The import is unclear. There is little private about a criminal who has, by his crime, harmed and offended the public and, often times, particular members of the public, such as the victim and his family.

[129] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

obtained evidence would undermine society's confidence in the law and breed contempt for it.

The argument is superficially attractive. The Supreme Court has instructed that "[a] rule admitting evidence in a criminal trial … has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[130] It is argued, therefore, that the exclusionary rule serves the important purpose of "enabling the judiciary to avoid the taint of partnership in official lawlessness," and that it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior. . . ."[131] Professor Kamisar concurs that a principal reason for the exclusionary rule is so "the Court's aid should be denied in order to maintain respect for law [and] to preserve the judicial process from contamination."[132]

Ideally, courts would dispense perfect justice in pristine circumstances. The real world is not so tidy, and in reaching an optimal cost-benefit calculus one must realistically consider how much contempt is engendered for the law and the courts when dangerous criminals are released without punishment because the police engaged in misconduct while gathering reliable, probative and relevant evidence of their guilt.

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[130] Terry v. Ohio, 392 U.S. 1, 13 (1968). This premise, of course, is not universally true. For example, evidence of child abuse admitted in divorce cases is often obtained through disreputable means, such as aggressive self-help and private investigators, *In re* A.R., 236 S.W.3d 460, 465–68 (Tex. App. 2007) (describing a mother's overzealous and failed attempts to win custody by proving child abuse through doctors, investigators, home videos, and other various means), Lourdes K. v. Gregory Q., No. S-96-016, 1997 WL 256681, at 3 (Ohio App. 1997) (referencing a mother bribing her son to say things against his father in interviews to determine whether abuse occurred or not), and hypnosis. S.V. v. R.V., 933 S.W.2d 1, 8–22 (Tex. 1996) (discussing repressed memory and other evidence in divorce cases); Borawick v. Shay, 68 F.3d 597, 597 (2d Cir. 1995) (discussing "hypnotically refreshed recollections" of child abuse); *but see* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 758–59 (1988)) (discussing how evidence of child abuse submitted by a mother often is not believed by the court). These decisions do not suggest that courts, by admitting such evidence, approve of the methods used to gather it, and it certainly does not prevent the appropriate authorities from addressing the underlying misconduct as needed. Other examples that can be offered to disprove Brandeis' premise are legion. *See, e.g.*, *infra* notes 176–77 and accompanying text (discussing private searches).

[131] United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

[132] Kamisar, *supra* note 92, at 604 (internal quotations omitted).

Imagine how much more contemptible society finds the law to be when a criminal freed under the auspices of the exclusionary rule reoffends, and the public thereafter learns that he was released for reasons that many would consider a legal technicality. It is fair to ask which categorical approach would breed more contempt for the law: (1) the status quo approach of freeing guilty and perhaps dangerous criminals without punishment for the sole purpose of deterring future police misconduct, or (2) an alternative approach which instead punishes the guilty based on evidence that the police obtained using unreasonable means even if doing so results in diminished deterrence of future police misconduct.

It also seems true that society would find it contemptible that offending officers (especially in egregious misconduct) often go unpunished, a fact that is attributable at least indirectly and in part to the existence of the exclusionary rule. It would seem even more contemptible that as a substitute for punishing misbehaving officers, the law has instead decided to prospectively deter them and others from engaging in future misconduct by suppressing the evidence they have gathered at a suspect's trial. Whatever contempt society may feel toward the law because a court admitted illegally obtained evidence at a trial would be largely mitigated if, along with punishing the guilty, the miscreant officers were made to pay for their misconduct and those who were victims of the police misconduct were properly compensated. Reasonable people would view this result—the guilty defendant being convicted and sentenced, the misbehaving officer being punished or sanctioned, and the victims being compensated—as a better resolution than could ever be realized through operation of the exclusionary rule. This alternative approach would achieve justice for the criminal, the police, the victim and society, and as a consequence would thereby promote respect for the law and for the courts that administer it.

Second, Brandeis suggests that the admission of illegally obtained evidence would "invite[] anarchy."[133] Leaving aside the rhetorical hyperbole, one might be tempted to respond simply that the Republic has managed to remain relatively anarchy-free for its first 130 years without the calming influence of a court-mandated, universal exclusionary rule.[134] When unrest of any sort did arise, such as during Shays'

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[133] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[134] Early in the nation's history, when police conducted an illegal search or seizure "[t]he criminal would have been convicted, and the offending constable would have been liable as a tort-feasor for trespassing upon a person's privacy without proper authority or

Rebellion[135] and the Civil War, a causal connection has never been suggested between such events and the unavailability of a federal exclusionary rule. And, more recently, one might note that the outbreak of urban riots[136] and campus unrest in the 1960s,[137] and the occupation of the Wisconsin state capital earlier this year, [138] all occurred despite the rule's purported ameliorative effects.

I suppose Brandeis's point is that in the absence of the exclusionary rule, the police could accumulate unchecked power that might lead to anarchy. Assuming there is some truth to this contention, history teaches that a concentration state authority and power is far more likely to lead to totalitarianism and oppression than it is to anarchy.[139] Further, if Brandeis is concerned that without the constraints of the exclusionary rule the police would run amok and indiscriminately trample the rights of citizens, then he places too little faith in the corrective effects of the

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cause." Gerald V. Bradley, *Searches and Seizures, in* THE HERITAGE GUIDE TO THE CONSTITUTION 325 (Edwin Meese III, ed. 2005). Later in time and prior to the universal imposition of the exclusionary rule by the Supreme Court, the states varied with regard to the adoption of an exclusionary rule in their courts. *See* People v. Defore, 150 N.E. 585, 587 (1926).

[135] LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE (2002). Ironically, Richards writes that Shays's Rebellion caused George Washington to emerge from retirement and advocate for a stronger national government. *Id*. at 1–4 & 129–30.

[136] *See, e.g.*, HUBERT G. LOCKE, THE DETROIT RIOT OF 1967 (Wayne State Univ. Press 1969); TOM HAYDEN, REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE (Vintage Press 1967); *see also* Les Payne, *The L.A. Riots: A 'Quick' Study*, NEWSDAY, July 26, 1992, at 32 (discussing more recent urban riots in Los Angeles).

[137] *See* David L. Kirp, *Convenience-Store Demonstrating*, CHI. TRIB. Apr. 22, 1986, at C13.

[138] *See* Abby Sewell, *Wisconsin Governor Unveils $1B-Plus in Cuts*, CHI. TRIB., Mar. 2, 2011, at C13.

[139] *See, e.g.*, Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409 (2008). Assume Brandeis is instead suggesting that admission of illegally obtained evidence would breed so much contempt and disrespect for the law that members of society would become motivated not to follow it. Again, this result could hardly be called "anarchy" as most people would nonetheless obey the law, perhaps even more scrupulously, because they feared unchecked police powers. This type of popular response to actual and potential police aggressiveness can be seen as another form of deterrence-motivated behavior. And, although a black-market economy might thrive and crime could flourish underground, it seems doubtful these are the kinds of circumstances Brandeis was contemplating when he referred to "anarchy." The simple truth is that as long as the police aggressively search and seize to enforce the law, fear of the police will promote obedience, rather than disobedience, of the law. While this state of affairs may tilt even excessively toward totalitarianism, it hardly risks anarchy.

democratic principles and structures that are integral to American law and society.[140] Law enforcement authorities operate under the direct control of the executive branch of the government and the indirect control of the people. If the police behave so egregiously as to incur public rancor, voters and taxpayers can surely make the political branches of government respond through the elective process and thereby constrain police excesses.[141] In any event, the courts would remain available to address the most extreme forms of police misconduct that "shocks the conscience."[142]

It should also be remembered that Brandeis's extravagant reference to anarchy was made in a 1928 Supreme Court decision, long before the many fundamental reforms in law enforcement policies and practices were instituted during the latter half of the twentieth century.[143] Police departments are now more professional and respectful of constitutional rights than they were in Brandeis's day.[144] Intra-departmental discipline of officers who engage in misconduct[145] and recourse to civil suits against offending police officials[146] appear more effective than in the

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

[141] *See* Samuel Walker & Morgan MacDonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 498–99 (2009). This article also discusses how citizens have used tort law to help curb police misconduct.

[142] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).

[143] *See generally* WILBUR MILLER, COPS AND BOBBIES 150–51 (2d ed. 1999); ROBERT FOGELSON, BIG CITY POLICE 3 (1977); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977) (all discussing police reform during the twentieth century); Walker & MacDonald, *supra* note 141, at 498–99 (discussing the history of police misconduct and past reforms as well as recent legislative reforms that have helped make police agencies self-monitoring and self-adaptive).

[144] *Developments in the Law*: *Confessions*, 79 HARV. L. REV. 935, 940 (1966) (contending that police misconduct occurs only in "extraordinary cases, having no relation to the ordinary day-to-day operations of a police department"). As one dissenting justice in *Miranda* asserted in the context of obtaining confessions, "the examples of police brutality mentioned by the Court [in the majority opinion] are rare exceptions to the thousands of cases that appear every year in the law reports." Miranda v. Arizona, 384 U.S. 436, 499–500 (1966) (Clark, J., dissenting).

[145] *See* Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 47 (1987) (proposing the decertification of police officers who violate the Fourth Amendment).

[146] *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL L. REV. 363, 384 (discussing civil suits and finding them inadequate to address police misconduct).

past.[147] Granting that the exclusionary rule played some role in the reform movement,[148] it is highly doubtful that the police would revert to nineteenth century hooliganism if the rule were repealed today. And, even assuming that a causal relationship between suppression and deterrence persists, it is likely that the importance of deterring police misconduct via suppression would vary between police departments and jurisdictions depending on a variety of factors, including the degree to which reforms have been successfully internalized and implemented. It is doubtful that one size fits all, yet the Supreme Court paints with a universal brush when it imposes its Court-made exclusionary rule as a binding national requirement.

Moreover, even allowing that some small chance of anarchy might be risked if the exclusionary rule were repealed, it seems apparent that a greater countervailing risk of anarchy is presently assumed by the rule's largely indiscriminate application. Keep in mind that the exclusionary rule can cut many ways. For example, one can only imagine the impact on public tranquility if brutal police officers were set free because evidence of their guilt was suppressed at their trials via the exclusionary rule. Even leaving aside these types of cases, it appears far more disruptive to the fabric of society and thus anarchy inducing to release some guilty and perhaps recidivist offenders because of the categorical application of the exclusionary rule, as compared to failing to deter some future police misconduct because of the absence of the exclusionary rule.

Third, Brandeis contends that the admission of illegally obtained evidence would "bring terrible retribution."[149] This concern is misplaced. Properly understood, retribution is the central and indispensible basis for criminal punishment.[150] According to retributive principles, one ought to

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[147] A more detailed discussion of such alternatives to the exclusionary rule are beyond the scope of this article.

[148] Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 80, 94 (1992) (explaining that in a study of Cook County, Illinois criminal courts, the exclusionary rule had an "institutional deterrent effect," in that "police and prosecutorial institutions respond[ed] to the exclusionary rule by designing programs and procedures to ensure compliance with the Fourth Amendment").

[149] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[150] *See* C.S. Lewis, *The Humanitarian Theory of Punishment*, ANGLEFIRE.COM, *available at* http://www.angelfire.com/pro/lewiscs/humanitarian.html (explaining that punishment cannot be removed from the concept of desert); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE

receive the punishment he deserves.[151] Retributive punishment benefits both the individual who is punished and the common good.[152] Other legitimate bases for punishment, such as deterrence[153] and rehabilitation,[154] are subsidiary to retribution.[155] We punish guilty people because they deserve it, and we do not punish innocent people even if doing so may rehabilitate them or deter others. Viewed in this light, retribution cannot be "terrible," as Brandeis describes it. Indeed, if we accept that a legitimate goal of the criminal law is to promote retribution that is morally justified, then we ought to be directly punishing the police officers who are personally guilty of conducting illegal searches or seizures because they deserve it, rather than trying to influence their future behavior indirectly by means of punishing the public at large who are not blameworthy for the misconduct perpetrated by the offending officers.

Perhaps Brandeis was warning about the possibility of "vengeance" rather than "retribution,"[156] expressing the belief that without the

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SCIENCE OF RIGHT 194–98 (W. Hastie trans., 1887) (explaining punishment can be imposed only because the individual on whom it is inflicted has committed a crime).

[151] Lewis, *supra* note 150; Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (Ferdinand Schoeman ed., 1987) (explaining that punishment is justified only because offenders deserve it).

[152] Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1891–92 (1991).

[153] *See* Eugene R. Milhizer, *Reflections on the Catholic Bishops' Statement about Deterrence*, 99 SOC. JUST. REP. 69 (2008) (discussing various aspects of deterrence and the legitimacy of deterrence as a basis for criminal punishment).

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

[155] *See* Lewis, *supra* note 150; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03(B), at 16–19 (4th ed. 2006) (discussing retributive justifications for punishment); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 630–31 (2009) (explaining that all adequate theories of punishment must derive from the principles of retribution); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) (explaining the basis for punishment under a retributive theory); Massaro, *supra* note 152, at 1891–92 (noting how retribution is the favored justification for punishment because it allows for punishment in more situations than do rationales based on deterrence and rehabilitation).

[156] Vengeance is usually associated with anger by one who is wronged, and with a desire to make the wrongdoer suffer for no reason other than to attempt to heal the pain of the wronged, while retribution is usually associated with seeking a just punishment for conduct that is morally culpable. *See* Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 490–91 (2009) (discussing vengeance and how it stems from emotional pain

constraints on police conduct emanating from the exclusionary rule private citizens would be more likely to take the law into their own hands. Any such concern that the exclusionary rule will provoke "terrible vengeance" likewise cannot withstand scrutiny. As a matter of simple logic, vengeance is sought by those who have been wronged (and sometimes by others in their stead) against those who have perpetrated the wrong. If it is true that if police misconduct would run rampant in the absence of the exclusionary rule, then any resulting vengeance would probably be directed towards the police by those whose rights were violated by the police. It is likewise true that if some guilty people go unpunished as a consequence of the present exclusionary rule, any resulting vengeance because of this would probably be directed towards these guilty people by those whom they had victimized.[157] It seems obvious that a systematic application of the exclusionary rule would provoke more vengeance by victims against criminals who avoid punishment than a repeal of the rule would provoke by the public against misbehaving police officers.[158] In other words, in the aggregate the exclusionary rule seems much more likely to encourage rather than discourage vigilantism.[159] And, if some form of exclusionary rule is

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and anger); Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT'L L. & POL'Y 189, 194–95 (2009) (discussing how retribution is aimed at giving the wrongdoer "the punishment they deserve"). There are some observers, however, who contend, incorrectly in my judgment, that there is no distinction between retribution and vengeance. Justice Marshall, for example, believed that retribution, retaliation, and vengeance are one and the same. Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 526 (2009).

[157] It is also possible that some "terrible vengeance" could be directed toward the government officials who apply the exclusionary rule and thereby release dangerous criminals.

[158] *See* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[D][2][b], at 381–83 (noting that the public finds the consequences of the exclusionary rule to be repulsive).

[159] Imagine the popular response if a killer who had terrorized a community for days or weeks was released because evidence of his guilt was excluded via the exclusionary rule. No doubt residents would turn to self-help measures to protect themselves, their families, and their property as the 'rule of law' failed to protect them. As it currently operates, the exclusionary rule thus could help provoke vigilantism as people might begin to feel that the law is impotent and their only effective option is self-obtained justice. This concern is understood with special force by some abused women who have unsuccessfully sought legal protection from their abusers. If the abuser returns to the streets or the victim's home unpunished, the victim may resort to killing the abuser because she has lost faith in the police to protect her. *See* Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237 (2008) (providing an analysis of women reacting to different situations where they feel helpless and without ability to seek protection from the law. Analogous situations may arise when citizens are once again faced with deadly

ultimately deemed to be necessary to curb vengeance by an angry public toward misbehaving police, then lawmakers can craft a more targeted approach to accomplish this objective.

Two final points are worth making, however briefly. First, if the basic and straightforward deterrence claims in support of the exclusionary rule are unverified and unverifiable, as has been established, then Brandeis's more abstract and expansive claims suffer the same infirmity but to a far greater degree.

Second, requiring exclusion as the principle remedy for Fourth Amendment violations can lead to the perverse result of unduly limiting Fourth Amendment protections. We are all familiar with the expression that bad facts lead to bad law. Consistent with this maxim, if the predominate means available for addressing marginal police behavior in egregious cases is through the suppression of critical evidence of guilt, then some judges may be tempted to declare questionable police conduct in extreme circumstances to be constitutional to avoid the remedy of suppression and its consequences.[160] This is a striking example of the impact of unintended consequences.[161]

For all of these reasons, the exclusionary rule cannot be justified by a more expansive and ostensibly noble set of utilitarian considerations espoused by Brandeis and others like him. Either instrumental approach—the Court's deterrence-based rule or Brandeis's more expansive and ostensibly nobler rule—results in the exclusion of reliable, probative, and relevant evidence of guilt, which is simply too costly when measured against the speculative, unverifiable and misguided benefits it seeks to achieve.

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criminals who are released because evidence is suppressed through the exclusionary rule).

[160] Slobogin, *supra* note 146, at 403 (contending that the exclusionary rule stultifies liberal interpretation of the Fourth Amendment, in large part because of judicial heuristics that grow out of constant exposure to litigants with dirty hands); *see also* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[A], at 374 (observing "[t]here is also reason to believe that many trial judges have chosen to accept questionable testimony by police officers regarding searches and seizures, in order to prevent the exclusion of otherwise reliable evidence of a defendant's guilt.").

[161] *See generally* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894–904 (1936) (applying a systematic analysis to the problem of unanticipated consequences of purposive social action).

VII. Myth #5: In any event, the Rule Is Needed to Preserve the Integrity of the Criminal Justice System

Some courts and commentators argue that apart from any utilitarian efficacy produced by the exclusionary rule, the rule is essential to preserve and protect the integrity of the criminal justice system.[162] I will refer to this as the value-based justification for exclusion. Its proponents assert that the integrity of the judicial process would be seriously compromised if the courts habitually received evidence obtained by the police in violation of the Fourth Amendment, and that this consequence alone is sufficient to justify the rule. Before squarely addressing the validity of this contention, it is instructive to examine the premises upon which it rests: an exaggerated and even romanticized view of the criminal justice system.

Criminal trials are human endeavors. They are characteristically marked by a rough-and-tumble confrontation between a prosecutor and a defense attorney, each motivated by different and usually competing objectives.[163] Trials are conducted in a charged environment where the stakes are high and implicate the possibility of a criminal conviction, financial punishment, confinement and, on rare occasions, even death. They ordinarily involve real victims who have suffered harm and seek justice and closure. In some cases, the community feels directly victimized or takes a special interest in a trial. Public safety from recidivism may also be at stake.

As with all human endeavors, the criminal justice system is imperfect. The law recognizes the legitimacy of criminal trials even when they are stained with serious substantive and procedural deficiencies. For example, verdicts are set aside only when errors of a

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[162] *See, e.g.*, Fred Gilbert Bennett, Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 119 (1973) (arguing in favor of retaining the exclusionary rule to promote judicial integrity); United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., joined by Douglas and Marshall, JJ., dissenting) (arguing courts can preserve judicial integrity by avoiding a partnership with police lawlessness).

[163] The Rules 3.1 and 3.8 of the *Model Rules of Professional Conduct* help highlight the different roles of the defense counsel and the prosecutor. MODEL RULES OF PROF'L CONDUCT R. 3.1 & 3.8 (2009). While defense counsel should never fabricate a story, he should advocate with force that the prosecutor prove every element of the crime. For an illustration of the competitiveness of trials, see generally *In re* Scott v. Hughes, 106 A.D.2d 355, 356 (1st Dept. 1984) (defense counsel's actions were "merely reflective of the intensity of the competitiveness of the trial and the zealousness of counsel").

certain magnitude have occurred. Depending on the circumstances, a guilty verdict will stand even if the judge is unwise or errs but does not abuse his discretion[164] or commit an error that is not plain.[165] In fact, Federal Rule of Evidence 403—like its military counterpart, MRE 403[166]—provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[167] In other words, under Rule 403, a criminal trial must tolerate unfair prejudice, confusion of the issues, and misleading of the jury, provided these infirmities are not too weighty. On other occasions, even an egregious error by a judge will not warrant reversal if it is deemed to be non-prejudicial.[168] Keep in mind that each of these situations involves courtroom errors by the trial judge, as contrasted to more remote and attenuated police misconduct that is the subject of the exclusionary rule. None of the evidentiary or appellate standards involving trial error cited above, even to the most ardent proponents of the exclusionary rule, are sufficiently weighty to undermine the integrity or legitimacy of the criminal justice system. These proponents know that to insist upon a perfect trial is to require the unobtainable.[169]

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[164] *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243–44 (2009) (explaining how appellate courts use the abuse of discretion standard to review a trial judge's mistakes and how the standard allows for errors of a certain magnitude).

[165] *See* United States v. Young, 470 U.S. 1, 14–15 (1985) (holding that the judge erred by allowing the prosecutor to continue with his statements, but that the error did not constitute plain error so the conviction was upheld).

[166] MCM, *supra* note 11, MIL. R. EVID. 403.

[167] FED. R. EVID. 403.

[168] *See* United States v. Olano, 507 U.S. 725, 734 (1993) (explaining that the defendant bears the burden of showing that he or she was prejudiced by the error).

[169] Then-Justice Rehnquist addressed the judicial integrity argument and the reality of imperfect criminal trials as follows:

> while it is quite true that courts are not to be participants in "dirty business," neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums in which both those charged with committing criminal acts and the society which makes the charge may have a fair trial in which relevant competent evidence is received in order to determine whether or not the charge is true.

California v. Minjares, 443 U.S. 916, 924 (1979) (Rehnquist, J., dissenting).

The criminal justice system likewise tolerates many varieties of police misconduct without invoking exclusion. With respect to confessions, for example, the Supreme Court in *Frazier v. Cupp*,[170] a 1969 case, considered whether lying to a suspect by the police while obtaining a confession renders the confession inadmissible. In *Frazier*, the police falsely told a suspect during interrogation that a co-suspect named Rawls had confessed to the crime.[171] The Court held "[t]he fact that the police misrepresented the statements that [another] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[172] In other words, an intrinsically evil act of lying[173] by the police, which results in obtaining a confession (which has been called the most damning kind of evidence of guilt),[174] is not so serious a blow to judicial integrity so as to require the judge to suppress the confession. Other forms of deceptive police conduct to obtain confessions, such as posing as an undercover agent or fellow prisoner, are likewise insufficient to require suppression.[175]

Improper searches and seizures of many kinds are also tolerated and do not trigger suppression. For example, a search or seizure carried out by a private individual, even if it is unreasonable, does not implicate the Fourth Amendment.[176] Accordingly, evidence seized during private searches is admissible. Moreover, a government search that merely

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[170] 374 U.S. 731 (1969).
[171] *Id*. at 737.
[172] *Id*. at 739.
[173] Whether all police deception is morally illicit is beyond the scope of this article. And, no claim is made here that all permissions of falsity in another's mind are unjust. For instance, few people would claim that the patrons of Anne Frank would have acted unjustly by refusing to allow Nazis erroneously to believe she was in the home. ANNE FRANK & ELEANOR ROOSEVELT, ANNE FRANK: THE DIARY OF A YOUNG GIRL (1993). The question of affirmative lying is more complicated and has spurred great debate. Even Albertus Magnus and his pupil, Aquinas, are reported to have disagreed on such matters. "Aquinas, like Kant and apparently unlike his teacher Albert the Great, was a rigorist in allowing no exceptions to the prohibition of lying." A.S. McGrade, *What Aquinas Should Have Said? Finnis's Reconstruction of Social and Political Thomism*, 44 AM. J. JURIS. 125, 132 (1999).
[174] *See* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMPLE L. REV. 1, 4–8 (2008) (describing the singularly important impact of confession evidence); Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (White, J., opinion of the Court) (concluding "[a] confession is like no other evidence." Indeed "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him").
[175] *See* Illinois v. Perkins, 496 U.S. 292 (1990) (holding a confession given to a law enforcement authority posing as a fellow prisoner was admissible).
[176] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984).

replicates a previous private intrusion is not a "search" under the Fourth Amendment; instead, it will be judged according to the degree that it exceeded the scope of the private search.[177]

Even when the police themselves engage in illegal searches and seizures, exclusion is not always required. Suppose the police illegally eavesdrop on a phone conversation between *A* and *B*, in which they implicate each other, as well as *C*, in a criminal enterprise. Thereafter, *A*, *B*, and *C* are each tried in separate criminal trials. The Court's decisional authority would hold that suppression is required at the trial of *A* and *B*, but not at *C*'s trial. This line drawing can be explained as a matter of "standing."[178] As a second example, assume an illegal search of *D*'s home by the police uncovers a murder weapon and leads to the identification of a witness who can provide incriminating testimony against *D*. Case law holds that the murder weapon must be excluded but the witness may be permitted to testify.[179] Inanimate objects are suppressed but tainted witness testimony is often allowed. As a third example, the Court has declined to apply the exclusionary rule in federal habeas corpus proceedings.[180] Many other exceptions to the exclusionary rule have been recognized by the Court, such as the good faith exception,[181] the public safety exception,[182] and the inevitable discovery exception.[183] And, in seeming contradiction to the position of the value-based proponents, evidence is more likely to be admitted consistent with the good faith exception when courts[184] or legislators,[185] rather than the police, engage in misconduct or err. Even when officers trespass on a

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[177] *Id*. at 115.
[178] *See supra* note 102 (discussing standing).
[179] *See* United States v. Ceccolini, 435 U.S. 268, 274–75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a "*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment").
[180] *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976) (concluding the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context).
[181] *See, e.g.*, United States v. Leon, 468 U.S. 897, 924 (1989) (recognizing a good faith exception to the exclusionary rule).
[182] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 651 (1984) (recognizing a public safety exception to the exclusionary rule).
[183] *See, e.g.*, Nix v. Williams, 467 U.S. 431, 448 (1984) (recognizing an inevitable discovery exception to the exclusionary rule).
[184] Arizona v. Evans, 514 U.S. 1, 10 (1995).
[185] Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

privately owned open field, the property they seize there will not be suppressed via the exclusionary rule.[186]

These examples demonstrate that in multiple contexts, including Fourth Amendment jurisprudence, the legal system tolerates substantial misconduct and error. Moreover, it absorbs error occurring in the courtroom at least as readily as error occurring at the stationhouse. Imperfection is accepted because the rules of procedure and admissibility are primarily a means to an end: justice. And, in the context of the criminal trial, justice resides more firmly and centrally in a truthful verdict than it does in the procedures that lead to a verdict, especially when the verdict turns out to be contrary to the truth because of truth-inhibiting procedures. Put another way, trial procedures derive much of their legitimacy because they generally accomplish their objective of achieving a just result. To more fully appreciate this ends/means distinction requires a brief discussion of the concept of "justice" and its relationship to "truth."

We can begin with the common definition of justice as external action[187]; "a habit whereby a man renders to each one his due . . . ."[188] Justice, according to this view,[189] is concerned both with the internal quality of an act and with its external consequences, i.e., the good of another.[190] As justice is a habit, however, it remains fundamentally a disposition of the individual.[191] This basic, Western definition of justice

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[186] Oliver v. United States, 466 U.S. 170, 180 (1984) (holding that it was not necessary to exclude drugs found on private property marked with no trespassing signs and bounded by fences and woods because the property was an 'open field' and thus did not receive Fourth Amendment protection).

[187] It is "external" in the sense that it is directed toward the good of another. *See infra* notes 188 & 190.

[188] AQUINAS, SUMMA THEOLOGIAE pt. II–II Q. 58, art. 1 (trans. Blackfriars of English Dominican Province trans., 1964).

[189] This should not be taken as the only theory of justice; there are several others of note. One such approach is the social-contract theory, reflected preeminently in writings of John Rawls, in particular in his *A Theory of Justice*. In this work, Rawls proposes a notion of "justice as fairness" and a theoretical "original position" from which to determine the principles that order a just society.

[190] "[Justice] is complete virtue in its fullest sense, because it is the actual exercise of a complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also . . . . justice, alone of the virtues, is thought to be 'another's good', because it is related to our neighbor . . . ." ARISTOTLE, NICOMACHEAN ETHICS bk. V1129B 30–1130a 5, *in* THE BASIC WORKS OF ARISTOTLE 1003–04 (Richard McKeon trans., 1941) (citing Plato's Republic).

[191] *Id.*

originated with Plato[192] and Aristotle.[193] Christian thinkers, building upon these premises,[194] reached various conclusions about justice by adding in elements drawn from theology.[195] Notwithstanding these variations, several common and basic understandings about justice can be confidently asserted.

Foremost among these is that justice cannot be sustained in the absence of truth. This is so because justice, by its very nature, is an equitable judgment, which is externally directed in the guise of other persons.[196] As St. Thomas Aquinas instructs, the purpose of justice is "to direct man in his relations with others . . . because it denotes a kind of equality, as its very name implies."[197] This does not mean, of course, that *justice* and *equality* are synonymous, as justice is an "unlimited good"[198] while equality is not.

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[192] PLATO, REPUBLIC, bk. I & II 331b–369e, *in* PLATO COMPLETE WORKS 975–1009 (John M. Cooper ed., G.M.A. Grube trans., 1997) (discussing various theories of justice before reaching a conclusion as to its nature). Of course, there are other venerable sources that addressed the concept of "justice." *E.g.*, *Proverbs* 28:5 ("Evil men understand nothing of justice, but those who seek the Lord understand it all.").

[193] "We see that all men mean by justice that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just . . . ." ARISTOTLE, *supra* note 190, bk. V1129a 6–10, at 1002.

[194] "To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosopher of our own day runs a thread of universal agreement on this point." Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 n.20 (1982) (quoting HENRY SIDGWICK, THE METHODS OF ETHICS 380 (7th ed. 1907)).

[195] As Gilson writes of Aquinas:

> St. Thomas hastens to profit by this admission to make a distinction between Greek justice, which is entirely directed to the good of the city, and a particular justice, enriching the soul which acquires and exercises it as one of the most precious perfections. This time it is no longer in Aristotle that St. Thomas finds the text which authorizes him to proclaim that this justice exists, it is in St. Matthew's Gospel: "Blessed are they who hunger and thirst after justice."

ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS 308 (1956).

[196] *See* AQUINAS, *supra* note 188, Q. 17, art. 4 ("True and false are opposed as contraries, and not, as some have said, as affirmation and negation . . . . For as truth implies an adequate apprehension of a thing, so falsity implies the contrary.").

[197] *Id.* at Q. 57, art. 1.

[198] Adler writes:

> [A]ll real goods are not of equal standing . . . . Some real goods are truly good only when limited. Pleasure is a real good, but we can want more pleasure than we need or more than is good for us to seek

Just as truth is the conformity of one's intellect with reality, so to justice is the equitable conformity of one's intentional acts[199] with reality in relation to other persons.[200] Justice, as a matter of historical reality, is the mortar that joins society to itself.[201] Mortimer Adler puts it this way: "Where love is absent, justice must step in to bind men together in states, so they can live peacefully and harmoniously with one another, acting and working together for a common purpose."[202]

> or obtain. The same is true of wealth. These are limited real goods. In contrast, knowledge is an unlimited real good. We can never seek or obtain more than is good for us . . . . [J]ustice is an unlimited good, as we shall presently see. One can want too much liberty and too much equality—more than it is good for us to have in relation to our fellowmen, and more than we have any right to. Not so with justice. No society can be too just; no individual can act more justly than is good for him or for his fellowmen.

MORTIMER ADLER, SIX GREAT IDEAS 137 (1981). As Aristotle writes of justice, "'neither evening nor morning star' is so wonderful . . . ." ARISTOTLE, *supra* note 190, bk. V, 1129b 26–29, at 1003.

[199] Aristotle, for one, claims that "a man acts unjustly or justly whenever he does such acts voluntarily; when involuntarily, he acts neither unjustly nor justly except in an incidental way; for he does things which happen to be just or unjust." ARISTOTLE, *supra* note 190, bk. V, 1135a 15–17, at 1015. In this sense, *T* commits an unjust act but is not unjust if he testifies, with all sincerity, that A^+ was the man he saw murder *B*—the reality being that A^+ has been long lost and as his yet unknown twin brother, A^-, was the real killer. Even though A^+ will be unjustly convicted, *T* is not guilty of being unjust. Were results all that mattered, then absurd possibilities would be allowed, as where one who intended to unjustly deprive an investor of money by selling a worthless piece of property could be considered to have acted justly if the land is later discovered to have large oil reserves on it and turns a nice profit for the investor.

[200] Adler makes the distinction between speaking falsity and lying:

> There is a clear difference between the judgment that what a man says is false and the judgment that he is telling a lie. His statement may be false without his necessarily being a liar. Try as he will to speak truthfully by saying precisely what he thinks, he may be mistaken in what he says through error or ignorance.
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> The person we ask for directions may honestly but erroneously think that a certain road is the shortest route to the destination we wish to reach. When he tells us which road to take, what he says is false, but not a lie. However, if he does in fact know another road to be shorter and withholds that information from us, then his statement is not only a false one, but also a lie.

ADLER, *supra* note 198, at 38.

[201] MORTIMER ADLER, ARISTOTLE FOR EVERYBODY 267 (1985).

[202] *Id.* at 104.

To act justly (equitably in regard to others) necessarily demands conformity of the intellect with reality so that proper judgments can be made. If one accepts this relationship between the intellect and reality, then the inescapable conclusion is that lying, deceptive silence, or the obfuscation of the truth are doubly injurious to justice. First, they can frustrate the desires of another for true knowledge. Second, they can separate the intellect of another from reality, thereby causing skewed judgment and baseless actions,[203] which would predictably lead to unjust results. Justice is the equitable conformity of action with reality, and injustice is the inequitable discordance of action and reality.[204] As Benjamin Disraeli once put it, "Justice is truth in action."[205]

In the context of a criminal trial, both truth and justice are more fully realized when the guilty are convicted and the innocent are acquitted. The suppression of probative, reliable and relevant evidence of guilt, especially if this results in the acquittal of one who is guilty, constitutes an injustice. The Supreme Court has called the search for the truth the central purpose of a criminal trial[206] and the "fundamental goal" of the

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[203] Thus, if *A* lies to *B*, claiming that *C* took his TV when *A* really was the thief, then *A* doubly injures justice. First, *A* intentionally confounds *B*'s desire for knowledge of what happened to his TV. Second, *A* directs blame (and possibly punishment) toward the undeserving *C*. Hence, *B* will be rightly angry should he discover *A*'s fraud, not only that he was lied to, but also because of any retributive acts he was tricked into imposing against *C*.

[204]

> [W]e speak of injustice in reference to an inequality between one person and another, when one man wishes to have more goods, riches for example, or honors, and less evils, such as toil and losses, and thus injustice has a special matter and is a particular vice opposed to particular justice.

AQUINAS, *supra* note 188, at Q. 59, art. 1.

[205] THE OXFORD DICTIONARY OF QUOTATIONS 275 (Elizabeth Knowles, ed.) (6th ed. 2004).

[206] Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 3 (2006) (explaining that "truthful confessions are singularly capable of promoting the search for truth, which the Supreme Court has described as a "fundamental goal" of the criminal justice system and the central purpose of a criminal trial" (citing *inter alia*, Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), and United States v. Nobles, 422 U.S. 225, 230 (1985)). *Accord* Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1064 (1992) (arguing the central importance of discovering the truth in the criminal justice system).

criminal justice system.[207] The basic purpose of the Federal Rules of Evidence, an important means to this end, is, in its own words, "that the truth may be ascertained . . . ."[208] When criminal trials produce truthful results their legitimacy and integrity are enhanced, and the public is reassured and more secure.[209] When court-created processes such as the Fourth Amendment exclusionary rule deceive the fact-finder and thereby cause the guilty to be acquitted, truth is encumbered, justice is threatened, and legitimacy and public confidence are undermined.

To better make the point, it is useful to move from an abstract discourse about truth and justice to concrete examples and applications of these concepts in circumstances that are analogous to those at stake in criminal trials.

> • Suppose the hiring committee of a grade school learns, through evidence illegally obtained by a school employee, that an applicant for a teaching position has a history of child sexual abuse. Should this information be excluded from the hiring committee's consideration in order to preserve the integrity of the school system and its hiring practices?
>
> • Suppose a regulating and approving authority learns, through evidence illegally obtained by one of its field investigators, that a prescription drug being considered for approval contains a mislabeled and untested substance. Should this information be excluded from the authority's consideration in order to preserve the integrity of the drug-approval process?
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> • Suppose a law professor at the JAG School learns, through evidence gathered by a student in a manner that violates the school's honor code, that another student who received an "A" grade cheated on a final examination. Should this information be excluded from the professor's determination of the cheating

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[207] United States v. Havens, 446 U.S. 620, 626 (1980). *See generally* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 1.07, at 140 (2003) (calling the ascertainment of the truth the "main goal" of a criminal trial).

[208] FED. R. EVID. 102.

[209] *Nobles*, 422 U.S. at 230 ("[T]he dual aim of our criminal justice system . . . is 'that guilt shall not escape or innocence suffer'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (stating that the purpose of a criminal trial is to "sort[] the guilty from the innocent").

> student's grade and the school's determination of the cheating student's class standing in order to preserve the integrity of the academic culture and the grading process?
>
> • Suppose a sport's governing body learns, through evidence obtained by an employee in a manner that violates the protections afforded to medical records, that a first-place swimmer used a banned performance enhancing drug during a swim meet. Should this information be excluded from the gold-medal determination process in order to preserve the integrity of athletic competition?

The answer to each of the above questions is self-evident: the improperly acquired evidence should be made available to the relevant decision-maker and should not, therefore, be excluded from consideration. A contrary approach, which endorses the suppression of such evidence, thereby sanctions predicating formal action on a deliberately misleading record. It would unwisely elevate process over substance. It would be unjust. It would harm and victimize individuals. It would deceive the public and cause it to lose confidence in legitimate authority. In the end, it would damage the very integrity of the decision-making system, of both its processes and its products, both real and perceived.

This is not to say that a principled and legitimate search for truth may never yield to countervailing considerations. Privacy, liberty, and property interests can be implicated by searches and seizures, illegal or otherwise. On rare occasions, human dignity and the common good may be so severely damaged by outrageous police misconduct that justice demands suppression. For example, no one can seriously contend that confessions obtained as a result of torture and truth serum have any place in a court of law.[210] In other circumstances, rules that promote important values through the exclusion of evidence in narrow situations, such as testimonial privileges,[211] are needed even when they are in tension with an unencumbered search for the truth.

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[210] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding suppression is required when the police misconduct is so egregious as to "shock the conscience").

[211] *See* Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, 357 (1935) (discussing the most traditional and basic privileges as well as arguments for and against expanding the privileges); *see also* Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 792 PLI/LIT 257, 274–75 (2009) (explaining differences between testimonial privileges (which protect the communication, but do not necessarily protect the information in the

The extent and manner in which the courts can address the problem of illegally obtained evidence while preserving the truth are serious topics that merit careful consideration. Perhaps the illegal conduct of the police officer could be made known at trial for the jury to consider in weighing the credibility of the police and the evidence they present. Perhaps criminal punishment can be mitigated to account for any violations of Fourth Amendment rights suffered by convicted criminals because of police misconduct. This approach would be particularly well-suited for jurisdictions that use some form of sentencing guidelines.[212] Indeed, some measure of recompense for the victims of police misconduct already occurs through the plea bargaining process, such as when charges are reduced or punishment is lessened in exchange for the defense foregoing illegal search or seizure claims. Finally, perhaps waivers of sovereign immunity can be expanded, making civil suits against miscreant police officers more available and attractive.[213] In the end, however, given the supreme importance of truth in achieving justice at a criminal trial, I would argue that courts should suppress truth-affirming evidence only when it is absolutely and demonstrably

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communication if it is available through other legal means) and informational privileges (which protect the information regardless of how it was communicated or found)). Testimonial privileges prevent the consideration of relevant and truthful information that cannot be obtained by any other means besides through the informant who is excluded from testifying. Suppressing such information inhibits one from understanding all of the relevant circumstances and thus encumbers the search for truth.

[212] For example, this type of mitigation might even be recognized under the Federal Sentencing Guidelines. *Cf.* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1. (2005) (authorizing downward departure of sentence based on defendant's acceptance of responsibility for his offense); *id.* § 4A1.3(1) (authorizing downward departure of sentence based on the defendant's favorable criminal history).

[213] One legislative initiative to replace the exclusionary rule would have provided:

> Evidence obtained as a result of a search or seizure that is otherwise admissible in a Federal criminal proceeding shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment of the Constitution.

See Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*," 38 BOSTON COL. L. REV. 205, 224 n.184 (1996). This legislation would also have provided for a civil remedy, specified damages, allowed for attorney's fees, addressed *Bivens* and provided for disciplining rogue police officers. *Id.* at 225–26. *See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 421–22 (1971) (Burger, C.J., dissenting) (proposing a five-faceted Congressional statute, including the waiver of sovereign immunity, creating a new cause of action, creating a quasi-judicial tribunal to adjudicate these claims).

necessary to achieve some other important, tangible, and immediate purpose.[214] The Fourth Amendment exclusionary rule, in my judgment, falls far short of satisfying this standard.

Judge Robert Bork, a colleague of mine at Ave Maria School of Law, once remarked:

> [One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society.[215]

Both our conscience and common sense tell us to have grave doubts about the moral claims of exclusionary rule proponents. They instruct that when a court excludes evidence of guilt when this is not constitutionally compelled,[216] or not directly needed to advance some discrete but important value (such as in the case of privileges), it ceases to act like a court of law. It does not seek justice. It obfuscates the truth without good or sufficient reason. It acts illegitimately and undermines the integrity of the criminal justice system, real and perceived. And, it may transgress the separation of powers the Constitution seeks to preserve.[217] Evaluating the exclusionary rule through this prism, the so-

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[214] The damage caused by the exclusion of truthful evidence is even more insidious. Suppressing evidence conflicts with the oath taken by witnesses to tell the truth, the whole truth, and nothing but the truth. *See generally* Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009) (discussing the significance of oath and their importance in obtaining truth). Juries hear and see this oath administered and witnesses swear to it. The exclusion of evidence can result in misleading, abusing, and disrespecting the jury, as well as requiring witnesses to evade or finesse their oaths.

[215] Patrick B. McGuigan, *An Interview with Judge Robert H. Bork*, JUD. NOTICE, June 1986, at 1, 6.

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

[217] This important issue is beyond the scope of this article. *See generally* Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 77 (1994) ("To the extent that supervisory power seeks to regulate matters ancillary to the criminal

called value-based justification for the exclusion rule—just as the various utilitarian justifications for it—cannot be sustained. Courts act with integrity when they apply just laws[218] to seek truth and thereby obtain real justice. They act otherwise when they create rules designed to hide the truth and thereby undermine just results for speculative and misguided purposes.

VIII. Conclusion

In conclusion, I would like to invoke two iconic expressions for your reflection. First, consider the scripture verse, "the truth will set you free."[219] In American courtrooms, thanks to the exclusionary rule, it is instead the perverse case that the suppression of the truth will sometimes set free undeserving and guilty criminals while denying the freedom of closure and justice to victims. Second, consider the expression "truth, justice, and the American way."[220] The way in American courtrooms, thanks to the exclusionary rule, is that truth and justice are sometimes decoupled by suppressing the former so as to undermine the latter. Your mind and heart should be telling you that this is fundamentally wrong and should not stand. This is the truth, and the truth should be served.

In my judgment, it is time for the Supreme Court to act like a court and not a quasi-legislative body.[221] The Court may wish to reconsider

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trial, and without any written guidance contained in either the federal or state constitutions or statutes, it is vulnerable to claims of judicial activism, unprincipled subjectivism, and a violation of separation of powers."); Michael D. Hatcher, Note, *Printz Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177, 202–03 (1999) ("[T]he extent to which the Court acted in a legislative manner in *Miranda* highlights [its] violation of separation of powers principles.").

[218] 1 ST. AUGUSTINE OF HIPPO, ON FREE CHOICE OF THE WILL § 5 (explaining that "[a]n unjust law is no law at all").

[219] *John* 6:32 ("[Y]ou will know the truth, and the truth will set you free.").

[220] *See* Erik Lundegaard, *Truth, Justice and (Fill in the Blank)*, N.Y. TIMES, June 30, 2006, *available at* http://www.nytimes.com/2006/06/30/opinion/30lundegaard.html (last visited May 29, 2012).

[221] In his dissent in *Dickerson v. United States*, Justice Scalia argued that

> [the Court's] continued application of the *Miranda* code to the States despite [the Court's] consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of *Miranda*'s salvation but rather evidence of its ultimate illegitimacy.

whether the exclusion of unconstitutionally obtained evidence is constitutionally mandated.[222] This is a jurisprudential issue within the Court's competence and authority to decide.[223] If the Court adheres to the position that the exclusionary rule is not of constitutional origin, there exists no justification—narrow and pragmatic, noble and expansive, or value-based and integrity-centered—that would continence anything approaching the broad range of exclusion required under the present rule.[224]

If the Court instead holds to its view that exclusion is not constitutionally required, then it must repeal the exclusionary rule and leave it to the policy-making branches of government, and to the states, to develop rules and procedures for addressing police misconduct.[225] This would impose upon law makers at all levels increased responsibilities to establish a regime that at once punishes and deters police misconduct while protecting the truth-seeking purpose of a criminal trial. Legislative- and executive-created rules could better serve utility, in that they can more effectively account for a broad range of variables and be adjusted over time. They are also more capable of integrating noble and majestic aspirations. And, they can better enhance the integrity of the courts and the legitimacy of the law. They could "unburden society from the

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530 U.S. 428, 456 (2000) (Scalia, J., dissenting). The same can be said about a court-imposed Fourth Amendment exclusionary rule. *See generally* Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (discussing the limits on the Court's authority to create prophylactic rules).

[222] Justice Brennan, a proponent of the exclusionary rule, lamented that its deconstitutionalization "left [him] with the uneasy feeling that . . . a majority of [his] colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases." United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting).

[223] Recognizing that the Court is competent to decide the constitutional issue does not necessarily mean that the Court would be correct in deciding that the exclusionary rule was required by the Constitution. While I believe that it is not, this is a question that is beyond the scope of this article. *See* Amar, *supra* note 209, at 785–86 (arguing there is no historical foundation for the exclusionary rule).

[224] Indeed, if the exclusionary rule is not of constitutional origin, then it is unclear by what authority the Supreme Court can exercise general supervisory authority over state courts. This question, and related issues involving separation of powers, is beyond the scope of this article.

[225] Even if the exclusionary rule were completely repealed and no new legislative or executive initiatives were undertaken, the criminal justice system would retain the ability to address the consequences of especially egregious police misconduct through mechanisms such as prosecutorial discretion, and executive clemency and pardons. A discussion of these processes is beyond the scope of this article.

consequences of an immoral and unwise rule, imposed by an illegitimate authority, designed to minimize one evil by threatening a different and often greater evil."[226]

I sincerely appreciate the privilege of being with you all today. Thank you for your attention and, far more importantly, for your service to our country.

[226] Milhizer, *Lottery Revisited*, *supra* note [*], at 768.