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WHY LIBERALS SHOULD CHUCK THE EXCLUSIONARY RULE

Christopher Slobogin*

In this article, Professor Christopher Slobogin makes a compelling new case against the exclusionary rule, from a "liberal" perspective. Moving beyond the inconclusive empirical data on the efficacy of the rule, he uses behavioral and motivational theory to demonstrate why the rule is structurally unable to deter individual police officers from performing most unconstitutional searches and seizures. He also argues, contrary to liberal dogma, that the rule is poor at promoting Fourth Amendment values at the systemic, departmental level. Finally, Professor Slobogin contends that the 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. He also explains why noninstrumental justifications for the rule, even when viewed from a liberal bias, fail to support a broad policy of exclusion.

In place of the exclusionary rule, Professor Slobogin proposes an administrative damages regime in which actions for Fourth Amendment violations would be brought directly against police officers and departments. The proposed regime includes: (1) liquidated damages for all constitutional violations, (2) personal liability for officers who knowingly or recklessly violate the Fourth Amendment, (3) departmental liability for all other violations, (4) state-paid legal assistance for all Fourth Amendment claims, and (5) a judicial decisionmaker. Professor Slobogin demonstrates how this regime would be superior to the exclusionary rule not only in deterring individual Fourth Amendment violations, but also in encouraging use of warrants, invigorating judicial review, diminishing racism on the beat, curbing perjury, improving hiring and training practices, and promoting respect for the system. Why Liberals Should Chuck the Exclusionary Rule adds considerable insight to the Fourth Amendment debate and promises to challenge the way both liberals and conservatives think about the exclusionary rule.

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I. INTRODUCTION

The Fourth Amendment “exclusionary rule” is one of the mainstays of liberal ideology. Among those who place themselves somewhat left of center, a stance against using unconstitutionally seized evidence is as *de rigueur* as being anti-death penalty or pro-choice. As a liberal (yes, I admit it) who grew up with the exclusionary rule, I resisted questioning its preeminence as a Fourth Amendment remedy for some time. Today, however, I have come to believe that the rule actually disserves the liberal cause. In this article, I argue that the rule ought to be limited dramatically and that an administrative damages regime should take its place.

The liberal creed, in Justice Holmes’s oft-cited language, is that without the exclusionary rule the Fourth Amendment would be a

mere “form of words.”¹ In modern parlance, the argument is that the rule does a good job at deterring illegal searches and seizures, or at least a better job than any other realistic alternative. In case it does not, however, liberals hold in reserve a whole series of noninstrumental arguments on behalf of the rule, all of which conclude that criminal defendants have a personal constitutional right to exclude evidence regardless of exclusion’s real-world effects. Convinced of some or all of these propositions, most liberals (or at least most academics who have considered the Fourth Amendment remedy issue)² cling to the exclusionary remedy despite its costs—not just of lost prosecutions, but of truncated Fourth Amendment law, corrupted police, prosecutors, and judges, and public disrespect for the criminal justice system.

Contrary to our wishful thinking, the utilitarian argument for the rule does not wash. The exclusionary rule is significantly flawed as a deterrent device, especially when compared to more direct sanctions on the police and police departments. Such sanctions would do a much better job than the exclusionary rule at deterring police misbehavior, motivating police departments to take the Fourth Amendment seriously, and ensuring the Fourth Amendment is fairly construed by the courts. Indeed, the greatest concern with a direct remedy is that it could overdeter the police, a consequence which, for many liberals, might well be preferable to the underdeterrence of the rule. Nor do the noninstrumental arguments for the rule fare much better. Even

1. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). In its original context, this language may merely have stood for the proposition that courts must provide judicial review of Fourth Amendment claims. See *infra* text accompanying notes 307-09. Today, it has a much broader meaning. See, e.g., *James v. Illinois*, 493 U.S. 307, 311 (1990) (linking Holmes’s statement with the proposition that “[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values”).

2. Among those who have indicated support for the rule (perhaps not all of whom would refer to themselves as “liberals”) are the following: Albert W. Alschuler, “*Close Enough for Government Work*”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 622-24 (1990); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1242-43; Yale Kamisar, *Does (Did) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition?”*, 16 CREIGHTON L. REV. 565, 665-67 (1983); Wayne R. LaFave, “*The Seductive Call of Expediency*”: *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 49-50 (1994); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule Reconsidered: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998); Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633 (1983); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-52 (1994); Daniel B. Yeager, *From the “Gatehouse” to the “Mansion”*: *Throwing Out Evidence in Criminal Cases*, CRIM. L. BULL., Mar.-Apr. 1998, at 118.

from a liberal's perspective, the arguments that have been derived from the Fifth Amendment, the Fourth Amendment, and the Due Process Clause do not support more than a shadow of the present rule.

This article makes the liberal's case for significantly limiting the scope of the exclusionary rule and developing another way of enforcing the Fourth Amendment. It argues that evidence should still be excluded when police flagrantly abridge Fourth Amendment rights or illegally seize private papers. Except in those rare instances, however, the primary judicial remedy for illegal searches and seizures should be monetary penalties, preferably exacted from the searching officers when they knowingly or recklessly violate the Fourth Amendment, and from the police department in all other cases of illegality. This regime is most likely to accomplish the liberal's twin goals of enforcing the Fourth Amendment and maintaining the overall integrity and constitutional viability of the criminal justice system.

Part II, which begins the body of the article, is a relatively detailed attempt at examining the individual and systemic effects of the rule and its best alternatives. The discussion presents new theoretical reasons, based on behavioral and motivational theory, as to why the rule *can't* work in the normal scheme of things. The rule is a poor deterrent because it imposes only weak punishment and confers even weaker rewards on the individual officer, and because it actually encourages disrespect for the Fourth Amendment. Admittedly, traditional tort damages and other remedies are no better (and are probably worse) as individual deterrent devices. Yet the theoretical insights of Part II suggest that if several structural changes are made, among them the adoption of an independent entity for bringing damages claims, a judicial hearing process, and a liquidated damages scheme, the damages action—or, more accurately, an administrative penalty system that has elements of a damages action—would be much more effective than the exclusionary rule as an enforcement mechanism.

Part II also looks at the effects of the rule and its alternatives at the organizational level. Sociological research indicates that the rule's much-vaunted effect on police departments leaves much to be desired. In contrast, economic and empirical analysis suggests that adoption of straightforward respondeat superior liability on the department would have a felicitous systemic effect. Furthermore, primarily because it would expose judges to innocent as well as guilty plaintiffs, such a regime would be superior to the exclusionary rule as a way of ensuring the courts pay fair heed to the Fourth Amendment.

While the literature abounds with thumbnail sketches of how various remedial alternatives would work,³ few authors have explored the complexities of motivating police and police departments to comply with the Fourth Amendment. Part II ends with a closer examination of the proposed alternative to the rule. Because it contemplates direct liability on both individual officers and their departments, the principal potential drawback of such a system is overdeterrence. At the same time, such a system poses a threat of underdeterrence when the pressure to obtain incriminating evidence makes the police or their employers willing to pay the cost, literally, of their unconstitutional acts. Both threats are manageable, however. The overdeterrent effect of direct liability is a legitimate concern in most government contexts, but there are reasons to believe that neither the police nor their employers will be overly self-protective in a liability regime; indeed, such a regime should coax them to resort to more productive law enforcement. The threat of underdeterrence can also easily be overstated, but, in any event, responsive adjustments to its potential can be made. With less certainty, the article also addresses the extent to which competing regimes can shape *judicial* behavior, particularly that of magistrates, and concludes, once again, that monetary penalties are preferable to exclusion.

Part III looks at the nonconsequentialist reasons that have been put forward in favor of the rule. The Fifth Amendment theory, based on an analogy between searches and compelled testimony, is largely incoherent, but a liberal might be able to salvage from it a rule of exclusion for private papers. The property theory, which relies on the individual's ownership interest in the seized property, at best provides the same protection. The status quo ante and judicial review theories both seek to nullify not only the illegal search but its consequences; they fail as bases for the exclusionary rule because they legitimately succeed only in the former goal. Finally, an argument that the intro-

3. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422-23 (1971) (Burger, J., dissenting) (quasi-judicial tribunal that would award damages); 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2184(a)(3) (John T. McNaughton ed., rev. 1961) (contempt citations); Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811-16 (1994) (damages regime allowing suit against both officers and entities using juries); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969-80 (1983) (damages regime, providing more detail than most other proposals); Robert Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 252-56 (1976) (internal disciplinary system); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982) (ombudsman system using juries); Carl McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659, 690 (1972) (internal rulemaking); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1999) (administrative damages proceeding); Virgil W. Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46, 62 (1957) (civil rights office that investigates police violations of the Constitution); Malcolm R. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 231-32 (1978) ("mini-trial" conducted after criminal trial with penalties imposed on individual officers plus a civil remedy for nonprosecuted cases).

duction of illegally seized evidence shocks the conscience sufficiently to violate due process can be sustained, at least from the liberal perspective, but only in a narrow category of cases involving egregious actions.

Part IV concludes the article with an attempt to assess the relative costs of the current regulatory system and the system that would exist if we were to follow through on the implications of parts II and III. The costs of exclusion are greater in number and extent than many perceive. The costs of the proposed system are likely to be significant as well. But a true liberal never shies away from reform just because it might involve a little money.

II. UTILITARIAN CONCERNS: THE RULE AND THE DAMAGES ACTION AS ENFORCEMENT MECHANISMS

The traditional concept of "deterrence" does not adequately encompass the potential utilitarian benefits of the exclusionary rule.⁴ Although deterrence of individual police misconduct has been the primary focus of the Supreme Court's exclusion jurisprudence,⁵ the impact of the rule on police institutions may also be a significant consideration to the extent police bureaucracies can affect police behavior. Furthermore, the rule's efficiency as a procedural mechanism might facilitate litigation of Fourth Amendment issues, thus promoting the law's development. In other words, to evaluate fully the beneficial impact of the rule, one has to assess its effect on the behavior of the police, the behavior of police institutions, and the behavior of the courts. Further, the ultimate utilitarian worth of the rule cannot be fairly analyzed unless the impact of its alternatives is evaluated.

This part of the article carries out this comparison in each of the three areas just noted. It concludes that a damages regime, albeit one significantly different than today's, is far superior to the exclusionary rule as a method of ensuring that individual officers, police departments, and the courts abide by the Fourth Amendment. This part then explores the extent to which such a damages regime might be *too* effective at suppressing the police's investigative urges; it also discusses the occasional scenarios in which it might underdeter police. It speculates how a damages regime might solve these various problems and concludes with a brief description of some competing models.

A. *Impact on the Police: Specific and General Deterrence*

No one is going to win the empirical debate over whether the exclusionary rule deters the police from committing a significant

4. See Mertens & Wasserstrom, *supra* note 2, at 394.

5. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (describing the rule as "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").

number of illegal searches and seizures.⁶ Most of the studies of the rule suggest that it forces police to pay more attention to the Fourth Amendment than they would without any sanction for illegal searches.⁷ At the same time, virtually all the studies also suggest that, for many police officers, concern over the rule is not a significant influence when contemplating a search or seizure.⁸ In short, we do not know how much the rule deters, either specifically (by deterring those whose searches result in exclusion) or generally (by deterring other officers).

We probably never will. General deterrence research is particularly difficult to carry out. Ideally, the deterrence researcher would compare the behavior of two populations, one of which operates under the desired disincentive, one of which does not, with all other variables held constant.⁹ Because, as a result of *Mapp v. Ohio*,¹⁰ the exclusionary rule is now imposed nationwide, no such study is possible

6. A sampling of studies includes the following: NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* (1982); GENERAL ACCOUNTING OFFICE, *REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL PROSECUTIONS* (1979) [hereinafter *REPORT BY THE COMPTROLLER*]; Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENTER RES. BULL. 1 (1986); Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973-74) [hereinafter Canon, *Failing Health*]; Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Level: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977) [hereinafter Canon, *Testing*]; William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina: The Study and the Implications*, 45 N.C. L. REV. 119 (1966); Stuart S. Nagel, *Law and Society: Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 COLO. L. REV. 75 (1992) [hereinafter Orfield, *Heater Factor*]; Perrin et al., *supra* note 3; James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034 (1991); Myron W. Orfield, Jr., Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) [hereinafter Orfield, *An Empirical Study*]; Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968) [hereinafter *Effect of Mapp v. Ohio*].

7. For instance, although hostile to the rule and believing it should be abolished, one group of authors that conducted its own study of the rule's effects admitted "that *Mapp* has probably made officers more aware of the Fourth Amendment, and has increased the number of warrants they obtain." Perrin et al., *supra* note 3, at 710-11.

8. For example, one of the early proponents of the rule had to concede, after his second empirical study of the issue, that "*Mapp* had seemingly little or no impact in the majority of cases." Canon, *Testing*, *supra* note 6, at 75.

9. For instance, much of the deterrence research concerning the death penalty employs this methodology, although there, too, third variables made the results of the research suspect. See NATIONAL ACADEMY OF SCIENCE, PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 8-9* (Alfred Blumquisten et al. eds., 1978) (concluding that interstate comparisons still failed to control adequately for the variety of demographic, cultural, and socioeconomic factors other than the death penalty that influence murder rates, and that this

today (although an intercountry study is theoretically feasible).¹¹ In principle, comparing practices in the same jurisdiction prior to and after *Mapp* was decided in 1961 could have produced useful information, but the pre/post research that was actually carried out suffered from significant methodological flaws,¹² and in any event was inconclusive.¹³ Moreover, even proving a significant decrease in illegal actions after 1961 would mean little, given that no meaningful remedy existed before *Mapp*.¹⁴ Observations of police in action,¹⁵ interviews,

fact, combined with the fact that homicides and executions are rare events, made all current studies suspect).

10. 367 U.S. 643 (1961).

11. As a practical matter, however, differences between cultures (e.g., crime rates, gun control, police and court organization) would make quantitative comparisons of police behavior virtually impossible. See Heffernan & Lovely, *supra* note 6, at 318-19 ("Cross-national comparison . . . is not meaningful given the major differences between American and foreign police.").

12. As Davies points out, studies based on search warrants issued, arrest and conviction statistics, recovered stolen property statistics, and seized contraband statistics, although theoretically useful in comparing pre-*Mapp* and post-*Mapp* search and seizure practices, could be affected by a host of factors other than those practices. See Thomas Y. Davies, *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, 756-64 (1974). Another problem with the pre/post studies is that record keeping before *Mapp* was extremely poor. See United States v. Janis, 428 U.S. 433, 451-52 (1976) ("Record keeping before *Mapp* was spotty at best, a fact which . . . severely hampers before-and-after studies.").

13. See, e.g., Canon, *Testing*, *supra* note 6, at 75 (reporting findings that, in the author's words "do not come close to supporting a claim that the rule wholly or largely works"); Oaks, *supra* note 6, at 709 ("The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."); Spiotto, *supra* note 6, at 248 (finding a marked increase in suppression motions in cases involving narcotics and guns, but a decrease in the percentage of motions granted); *Effect of Mapp v. Ohio*, *supra* note 6, at 103 ("Police practices in New York City narcotics enforcement . . . have not changed substantially as a result of *Mapp* . . . [but] [t]he data show that convictions have been harder to obtain since *Mapp*.").

14. See Katz, *supra* note 6, at 119, 132 (reporting that 90% or more of prosecutors, defense lawyers, and judges surveyed in North Carolina in 1965 had never heard of a civil suit or criminal suit being brought against officers for illegal search and seizure); Nagel, *supra* note 6, at 302 (reporting that of 113 judges, prosecutors, defense attorneys, police chiefs, and ACLU lawyers surveyed nationwide as to the state of affairs during the five years between 1958 and 1963, 76% said they knew of no civil actions against the police for illegal searches and seizures, and 92% said they knew of no criminal actions against the police for such actions).

This point also undercuts the relevance of pre/post research using another methodology, asking those affected by *Mapp* about its effects. In these studies, police chiefs, attorneys, and judges typically reported greater adherence to the Fourth Amendment since *Mapp*, although some reported no changes and some reported a decrease in adherence. See Nagel, *supra* note 6, at 286-87. See generally Katz, *supra* note 6, at 149-50. Such reports are of limited usefulness to the extent they merely represent the difference between a regime with no remedy and one with the exclusionary rule. Virtually no one disputes that the rule has *some* effect on police behavior. See *supra* note 7. The important issue is the extent of its effect, as compared with other possibilities.

15. See generally JONATHAN RUBINSTEIN, CITY POLICE (1973) (observations of a journalist/sociologist from 1969 to 1971 of Philadelphia police in the academy, the police station, and on the streets); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL (1975) (observations of a sociologist in 1962 and 1963 of police in "Westville," a midwestern city of approximately 400,000, and two weeks of observation of police in "Eastville," a city of comparable size); Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24, 29 (1980) (study of New York police between 1971 and 1974 involving 90 interviews of police commanders,

and questionnaires¹⁶ are probably the best source of data we have. Even here, however, there are significant problems. Observational studies to date have been anecdotal in nature,¹⁷ interviews may be tainted by underreporting of misbehavior,¹⁸ and conclusions drawn from hypothetical questions are plagued by the external validity problem familiar to all social scientists who try to draw generalizations about actual behavior from laboratory studies.¹⁹ Specific deterrence research is, by comparison, somewhat easier, because we can look at the number of repeat "offenses" for those who are caught, but even here other influential variables are hard to factor out.²⁰

Given the limitations of empirical inquiry,²¹ we must rely on speculation. Most of the speculation has, to date, been unaided by any theoretical underpinning; thus, one is left with two plausible points of view without any way of evaluating their relative merits. Those who favor the rule can reasonably assert that officers who know illegally seized evidence will be excluded cannot help but try to avoid illegal

"countless conversations" with police officer students he trained, and observation of 40 tours of duty).

16. See generally Akers & Lanza-Kaduce, *supra* note 6 (interviewing officers from two southeastern jurisdictions); Heffernan & Lovely, *supra* note 6 (posing hypotheticals to police officers from four departments in the northeast); Perrin et al., *supra* note 3, at 27-32 (posing hypotheticals to officers in Southern California); Orfield, *An Empirical Study*, *supra* note 6 (interviewing narcotics officers from Chicago).

17. Neither Loewenthal, Rubinstein, nor Skolnick, whose studies are cited *supra* note 15, attempted to quantify their observations. Rather their information consists of descriptions of individual police behavior and generalizations drawn from them.

18. See, e.g., Akers & Lanza-Kaduce, *supra* note 6, at 4 ("There is probably underreporting reflected in these figures, and the actual level of illegal search behavior may be higher.").

19. Cf. Heffernan & Lovely, *supra* note 6, at 345-55 (reporting a study in which researchers described a situation to officers and then asked them whether they would conduct a search or seizure). On the general issue of the extent to which hypothetical situations can produce generalizable findings, see Vladimir J. Konecni & Ebbe B. Ebbesen, *External Validity of Research in Legal Psychology*, 3 *LAW & HUM. BEHAV.* 39 (1979).

20. For instance, an officer who has evidence excluded may never "reoffend" for any number of reasons other than exclusion, including fear of other sanctions or simply because he never again is confronted with a difficult search scenario. Comparing knowledge of Fourth Amendment law among those who have been subject to suppression and those who have not, as Perrin et al., *supra* note 3, at 734, have done, is another methodology for measuring specific deterrence. The same type of problems occur, however, because a failure of those who have had evidence suppressed to know more Fourth Amendment law than those who have not (which is what Perrin et al. found) could be due to a number of factors, including the precise questions asked, the training available, and overall intelligence. Consider also that, "unless they are very precisely worded and extensively pre-tested," such test questions have serious internal validity problems (i.e., they may not measure what they purport to measure). See Nagel, *supra* note 6, at 305 & n.35.

21. After considering the methodological difficulties inherent in the research, Davies concluded "[w]hen all factors are considered, 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." Davies, *supra* note 12, at 763-64; see also Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 *WASH. L. REV.* 647, 656 (1982) ("No research design yet conceived is capable of distinguishing between the number of nonoccurring illegal searches that can be attributed to police policies and the number of nonoccurrences correctly attributed solely to the effect of the exclusionary rule. . . . The actual research task is factually hopeless.").

searches because they will have nothing to gain from them; proponents can also note that police are often bitter or confused when the fruits of their searches are excluded and therefore must be deterred from facing that prospect again. Just as reasonably, those who oppose the rule can point out that its most direct consequence is imposed on the prosecutor rather than the cop, that police know and count on the fact that the rule is rarely applied (for both legal and not-so-legal reasons), and that the rule cannot affect searches and seizures the police believe will not result in prosecution.

There are more structured ways of thinking about the problem. For instance, Richard Posner has used economic theory to argue against the exclusionary rule.²² Unfortunately, his argument, as is true of much economic argument,²³ is based on highly suspect assumptions about how humans behave.²⁴ While police bureaucrats may make the kinds of dollars-and-cents calculations that Posner hypothesizes, the individual officer in the street is unlikely to do so.

If the goal is to analyze the effects of the rule on conduct by individual police, we need theories that describe, rather than assume, how people are motivated. Behavioral theory,²⁵ which has proven successful at constructing means of suppressing unwanted behavior,²⁶ is one such theory. Tom Tyler's work studying how the perceived legitimacy of legal institutions affects compliance with the law also provides useful food for thought in this regard.²⁷ Application of either one of these theories to the exclusionary rule suggests that it is not a particularly effective way of motivating police to obey the Fourth Amendment.

22. See Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 [hereinafter Posner, *Rethinking*]; Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638-641 (1982) [hereinafter Posner, *Excessive Sanctions*].

23. See generally Jeffrey L. Harrison, *Egoism, Altruism and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986).

24. Posner argued that the exclusionary rule "overdeters" based on the assumption that the cost of "cleaning up" after a search (which he sets hypothetically at \$100) is one one-hundredth of the cost of a lost conviction (which he sets at \$10,000) and that therefore all that is needed for "optimal" deterrence of the search is a \$100 fine, not exclusion. See Posner, *Excessive Sanctions*, *supra* note 22, at 638. The flaws in this set of assumptions about how police think are described later in this article. See also Morris, *supra* note 21, at 659-63 (arguing that many of Posner's assumptions are arbitrary).

25. The phrase "behavioral theory" or "behaviorism," as used in this article, refers to that body of psychology that focuses on the study of observable behavior rather than on consciousness. See generally GERALD C. DAVISON & JOHN M. NEALE, *ABNORMAL PSYCHOLOGY* 40 (7th ed. 1997). It includes theory developed from studies of classical conditioning (the connection between stimuli and behavior), as well as operant conditioning (the relationship between behavior and its consequences). See *id.* at 39-42.

26. Much of the original success was with animals and children, although today behavioral theory is widely used with adults as well. See *id.* at 40-45.

27. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

1. Behavioral Theory

Based on the theories of Edward Thorndike²⁸ and B.F. Skinner,²⁹ behaviorists have identified a number of responses to a particular act that might condition future acts. With some significant simplification, these responses can be reduced to four: (1) punishment presentation; (2) reward presentation; (3) punishment withdrawal; (4) reward withdrawal.³⁰ To extinguish unwanted behavior and replace it with desired behavior, the optimal approach employs all four responses.³¹ For instance, if the goal is to get underachievers to improve their grades, one cannot only punish for bad grades (e.g., by “grounding” the offender) and reward for good grades (e.g., by conferring a new boombox), but also withdraw punishment after good grades (e.g., by restoring freedom of movement) or withdraw rewards after bad grades (e.g., by taking away the boombox).

At first glance, the exclusionary rule might seem to fare well as a behavior-changing mechanism. It appears to punish the officer who engages in illegal conduct (by preventing conviction or making it more difficult), reward the officer who obeys the Constitution (by permitting prosecution to go forward), and withdraw reward from the misbehaving officer (by taking away illegally discovered evidence). In fact, however, the exclusionary scheme does not feature reward withdrawal at all, and is both a weak punishment and a weak reward.

As a technical matter, reward withdrawal only occurs with the withdrawal of a previously conferred positive response to the desired behavior. Because evidence that is excluded is fruit of a search, rather than a benefit that preceded the search, it is not a “reward” in behavioral parlance. An example of reward withdrawal in the search and seizure context might be removal of a salary increase previously conferred for constitutional behavior. Thus, a behaviorist would conceptualize exclusion of evidence as a punishment response, if anything.

The rule *is* a punishment, but only minimally so from the behavioral perspective. To understand why, consider the principles set out by Professor Jon Williams summarizing the optimal means of extinguishing behavior through punishment.³² He describes several “Con-

28. See, e.g., EDWARD L. THORNDIKE, *FUNDAMENTALS OF LEARNING* (1932).

29. See, e.g., B.F. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1953).

30. See JOZEF COHEN, *OPERANT BEHAVIOR AND OPERANT CONDITIONING* 9 (1969). Cohen describes how these four basic responses can be subdivided into eight “training procedures.” See *id.* at 9-12. It should also be noted that the simple description in the text does not accurately represent modern developments in behaviorism, which are usually classified as “cognitive behaviorism” and which focus less on effecting changes in behavior per se and more on changing a person’s thought processes through modeling, behavior rehearsal, aversive conditioning, and the like. See DAVISON & NEALE, *supra* note 25, at 44-45.

31. See COHEN, *supra* note 30, at 9.

32. See generally JON L. WILLIAMS, *OPERANT LEARNING: PROCEDURES FOR CHANGING BEHAVIOR* (1973).

ditions for Maximum Effectiveness of Punishment," which are paraphrased and reordered here to fit the search and seizure setting:

- (1) "Unauthorized escape responses" should be avoided, meaning that all of the undesired conduct should be detected.
- (2) The frequency of the punishing stimulus should be as high as possible; ideally it should be given after every incident of misconduct.
- (3) The punishing stimulus should be delivered "abruptly and immediately" after the occurrence of the misconduct.
- (4) The punishing stimulus should be "intense," i.e., clearly be a punishment to the subject.
- (5) Incidental rewards for performing the undesired conduct should be kept to a minimum.³³

A key defect of the exclusionary rule from the behavioral perspective is that it is not applied in the vast majority of illegal searches and seizures, thus failing both conditions #1 and #2. In a large number of cases involving questionable stops and searches, the police do not make an arrest, either because they never intended to do so³⁴ or be-

33. See *id.* at 154-55. Williams's six points, in the order in which he gives them, are as follows:

- 1) The punishing stimulus should be arranged in such a manner that no unauthorized escape responses are possible
- 2) The punishing stimulus should be intense and should be delivered abruptly and immediately after the occurrence of the "incorrect" response.
- 3) The frequency of the punishing stimulus should be as high as possible; ideally it should be given after every response.
- 4) The level of motivation for making the undesired behavior should be low
- 5) An alternative response should be available for the subject to perform
- 6) Care should be taken to ensure that a punishing stimulus is not inadvertently followed by a positive reward

The summary in the text reverses conditions 2 and 3 and makes the first part of 2 condition 4. It eliminates 5 (because there is almost always an acceptable alternative response in our context—e.g., a constitutional search or no search) and combines 4 with 6.

34. See, e.g., Neil A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 476-78 (1971) (describing searches and seizures conducted solely for the purpose of establishing and maintaining authority, self-protection, information attainment, and harassment). Similarly, data from New Orleans from the late 1960s indicated that less than 1 out of every 100 people stopped by police were prosecuted, strongly suggesting that stops and frisks in that jurisdiction were pursued for ends other than arrest or prosecution. See ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 92 (1971). Skolnick also remarks that police often conduct searches they know to be illegal for purposes other than arrest. According to him, the officer's reasoning is as follows:

By failing to make the putatively "unreasonable" search, the policeman would not only have failed to gain a conviction but would also have missed collecting objects or substances regarded as dangerous. In the policeman's view, only good can come out of a search legally defined as "unreasonable," provided the search jibes with normative assumptions of the police organization about reasonableness.

SKOLNICK, *supra* note 15, at 220. Finally, Professor LaFave, a proponent of the rule, concluded that "arrests for purposes other than prosecution are common." WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 437 (1965). One such purpose that is becoming increasingly prevalent is seizure of items pursuant to forfeiture laws. See generally William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309 (1992).

cause they find nothing,³⁵ so the exclusionary rule never has a chance to come into play. Even when an arrest occurs, the search issue frequently is not litigated because the police don't pursue the case,³⁶ or because the case is resolved through a plea or in some other fashion that avoids or undermines a hearing on the Fourth Amendment issue.³⁷ The number of cases in the latter category is enormous; plea bargains dispose of ninety to ninety-five percent of all criminal actions.³⁸

Even when the search issue is litigated, illegal searches may not result in exclusion. Set aside the fact that today's swiss cheese exclusionary rule is a mere shadow of what it could be.³⁹ Even given its full

35. The error rate on searches is unknown, but it is certainly well over 10% and may be over 50% for some types of searches. See *infra* note 174. Of course, the rule might deter illegal searches in these situations if the police intended to arrest had they found something. But the knowledge that nothing will happen to them if they do not find anything undercuts that deterrent effect, especially when combined with the facts, discussed below, that they can decline to push the case if they do find something and that, even if the case is prosecuted, exclusion is rare.

36. See Milner, *supra* note 34, at 476-78 (explaining that an officer may arrest: (1) "not so much because he hopes that successful prosecution will result but because he believes that the demeanor of the citizen may warrant this use of the police officer's power"; (2) to "obtain evidence for a more important case"; or (3) because he does "not like the life style or political views" of the people he arrests).

That many cases involving illegal searches and seizures never get to the prosecutor explains why statements from prosecutors to the effect that the rule deters are suspect. See, e.g., Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 28, 30 ("I have watched the rule deter, routinely, throughout my years as a prosecutor."). Such statements are not intentionally misleading; they are just not based on the full picture.

37. According to reports from students of mine who have been involved in externships in Jacksonville, Florida, many Fourth Amendment issues never get raised because of the pressure to resolve cases quickly through plea bargaining. Skolnick explains:

That incriminating evidence is found is a fact not lost on the defense attorney. . . . For him . . . operating in a context of "reasonableness," as understood in the administrative sense, the defendant comes to represent a less defensible client. . . . In the routine minor case . . . evidence may influence the defense attorney to persuade his client to plead guilty. This tendency is pronounced when, as so often happens, the reasonableness of the arrest is a borderline judgment.

SKOLNICK, *supra* note 15, at 223.

Even when suppression motions are made, plea bargaining is still likely to produce a conviction and thus undermine deterrence of the police. One study of 31 plea negotiations in which there was a pending motion to suppress found that in some cases prosecutors would only offer a bargain if the motion were dropped (although in many others the bargaining proceeded independently of the motion). See J.A. Gilboy, *Guilty Plea Negotiations and the Exclusionary Rule of Evidence: A Case Study of Chicago Narcotics Courts*, 67 J. CRIM. L. & CRIMINOLOGY 89, 93-95 (1976). Unfortunately, the study does not indicate how many of the 31 cases resulted in conviction for some crime. Elsewhere in the report, however, the author indicates that the overall conviction rate was 80%, see *id.* at 96 tbl.III, suggesting that the rule had negligible effect. The author also noted that discovery was difficult at the plea-bargaining stage and thus that "it is possible that the plea bargaining process—by compelling the litigation of evidentiary issues at a stage where the means to deal with them are unavailable—may have a significant effect on the efficacy of the exclusionary rule." *Id.* at 98.

38. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (1998).

39. As it stands now, illegally seized evidence is not excluded when it is introduced in any of the following manners: (1) in a proceeding other than the criminal trial; (2) against someone whose rights were not violated; (3) for impeachment purposes; (4) when the search was con-

potential breadth, exclusion's punch is reduced considerably by police facility in lying about their actions,⁴⁰ the hindsight biasing effect of judicial knowledge that criminal evidence was found,⁴¹ and judicial reticence in excluding dispositive evidence.⁴² In combination, these various realities mean that, under the exclusionary rule regime, illegal searches and seizures often remain undetected by the official punishing entity (the suppression court), thus violating condition #1,⁴³ and never come close to being routinely or consistently punished even when detected, in violation of condition #2.

Even when exclusion results, it is not a particularly strong punishment. First, in violation of condition #3, exclusion often occurs well after the misconduct,⁴⁴ is never communicated to the offending party,

ducted in good-faith reliance on a statute, warrant, or computer printout; or (5) the evidence would inevitably have been discovered anyway or bears only an attenuated connection to the illegality. See generally CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* §§ 2.03-04 (3d ed. 1993 & Supp. 1998).

40. For a general description of the nature and extent of perjury in suppression hearings, see Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 *COLO. L. REV.* 1037, 1041-48 (1996) ("Whether it is conjecture by individual observers, a survey of criminal attorneys, or a more sophisticated study, the existing literature demonstrates a widespread belief that testifying is a frequent occurrence."). As an example, in one pre-*Mapp*, post-*Mapp* study, the number of "dropsy" cases (i.e., cases in which the officer testified that the defendant dropped the contraband to the ground or had it in hand or in plain view) increased from 27.5% prior to *Mapp* to 72.7% in 1964. See *Effect of Mapp v. Ohio*, *supra* note 6, at 95. The authors of the study, supporters of the exclusionary rule, conclude that uniform police "have been fabricating grounds of arrest in narcotics cases in order to circumvent the requirements of *Mapp*." *Id.*; see also Perrin et al., *supra* note 6, at 735 (concluding, after surveying most of the exclusionary rule studies, that "[t]he responses are consistent with the widely-held belief that the exclusionary rule imposes a substantial cost on society in the form of police officer deception").

41. Many have speculated that hindsight bias influences judicial decisionmaking about Fourth Amendment issues. See, e.g., SKOLNICK, *supra* note 15, at 221 ("The illegality of a search is likely to be tempered—even in the eyes of the judiciary—by the discovery of incriminating evidence on the suspect."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 *VA. L. REV.* 881, 912 (1991) ("It must be much harder for a judge to decide that an officer had something less than probable cause to believe cocaine was in the trunk of a defendant's car when the cocaine was in fact there."). There is some empirical support for this point of view. Using 50 search and seizure scenarios, one study compared a group that was told evidence was found in each search to a group that did not know the action's outcome. The former group was much less likely than the latter to find a given investigative technique "intrusive." See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 *DUKE L.J.* 727, 765-68 (1993).

42. See MALCOLM RICHARD WILKEY, *ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE* 18-19 (1982) (discussing trial-court hostility to the exclusionary rule); Orfield, *Heater Factor*, *supra* note 6, at 115, 121 (reporting that 9 of 12 judges, 9 of 14 prosecutors, and 14 of 14 public defenders expressed belief that judges sometimes did not suppress evidence when they knew police searches were illegal, either because they felt suppression would be unjust, did not want the adverse publicity, or were facing reelection).

43. Thus, from a behavioral perspective, the fact that the exclusionary rule does not deter police conduct aimed at goals other than conviction is not "beside the point," as Mertens and Wasserstrom have argued. Mertens & Wasserstrom, *supra* note 2, at 397. To the extent police aren't punished for illegal searches and seizures, whatever the reason, behavior-changing effects are diminished.

44. In cases that go to trial, suppression hearings usually take place well after arrest. See, e.g., *United States v. Campbell*, No. 97-1446, 1998 WL 432958, at *1 (2d Cir. Apr. 21, 1998) (one year); *State v. Staton*, 924 P.2d 127, 130 (Colo. 1996) ("some" months); *State v. Hubbel*, 951 P.2d

or both.⁴⁵ More importantly, when all is said and done, even exclusion communicated to the offending officer is not experienced as much of a punishment, and thus violates condition #4. This is not just the oft-repeated point that the pain of exclusion is visited most directly on the prosecutor,⁴⁶ but the recognition that the objective of police who conduct searches is, first and foremost, evidence to support an *arrest*, not a conviction. Yes, police want convictions. But the sociological literature strongly suggests that the primary goal of officers in the field in the average case is to get a “collar.”⁴⁷ If they do, they’ve done their

971, 973-74 (Mont. 1998) (approximately five months); *Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998) (six months); *State v. Chouinard*, No. 03C01-9311-CR-00357, 1995 WL 50752, at *1, *5 (Tenn. Crim. App. Feb. 9, 1995) (three months); *State v. O’Connor*, No. 20083-0-II, 1997 WL 74618 (Wash. Ct. App. Feb. 21, 1997) (three months). In cases that are resolved through plea, those suppression hearings that do occur take place early in the process. *See supra* note 37. But suppression in the latter cases apparently is rarely communicated to officers. *See infra* note 45.

45. *See, e.g.*, Francis A. Gilligan, *The Federal Torts Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1, 4 (1975) (“Neither the judge nor the prosecutor adequately explains a court ruling on the exclusionary rule so that it might be understood by the police officer.”); Eugene Michael Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer’s Perspective*, 10 PAC. L.J. 33, 42 (1979) (“Seldom will individual officers learn of trial problems occasioned by their faulty searches and seizures.”); Oaks, *supra* note 6, at 730 (referring to the comments of Wayne LaFave and Frank J. Remington that police whose conduct leads to suppression are not “well informed about the trial judge’s decision or its legal basis”). For plea-bargained cases, the lines of communication may be much worse. One former prosecutor asserts that even where a plea agreement reflects the “uncertainty [on the Fourth Amendment issue] in a lower sentence, it is extremely rare for the police officer responsible for the error to be informed of his or her responsibility for the reduced sentence.” Barnett, *supra* note 3, at 956 n.46.

Orfield concludes otherwise in his study in Chicago, although his data are somewhat more equivocal than his conclusion. *See Orfield, An Empirical Study, supra* note 6, at 1033, 1035 n.85 (reporting that 85% of officers surveyed stated that they “always” learned the outcome of a suppression hearing in which they testified and, at the same time, reporting that a little over half “usually” understand the basis for the ruling).

46. *See Oaks, supra* note 6, at 726.

47. Rubinstein’s observations of police in Philadelphia led him to conclude that conviction rates were unimportant to both the police and their immediate supervisors. *See RUBINSTEIN, supra* note 15, at 45 (“Arrest activity is computed from what the patrolman ‘puts on the books’ and not by the disposition of his cases in court. Since activity is a measure of his work, his sergeant has no interest in what eventually happens to the cases.”). Based on his observations of New York City police (both on the beat and in training programs), Loewenthal reached a similar conclusion: “[T]hese policemen, especially those who are assigned to narcotics and gambling investigations, are evaluated almost exclusively on their arrest records, and pressures for arrests dominate their working lives.” Loewenthal, *supra* note 15, at 33. He continued:

Some individual police officers, particularly detectives, may be concerned about convictions, especially where heinous crimes are involved. However, most police officers feel that they have little control over convictions, since failure to convict may occur for myriad reasons which are unrelated to the police officer’s efforts. Moreover, in view of the fact that cases are frequently delayed for long periods of time, police often feel remote in both time and place from the final determination. At the same time, command pressures tend to focus on numbers of arrests, since arrests are easy to calculate, do not require lengthy follow-up in court and can be readily used to demonstrate police effectiveness to the public. Thus, arrests, not convictions, constitute the primary indicia of success in police work.

Id. at 34 n.29.

Skolnick notes that “[f]or detectives, clearance rates are the most important measure of accomplishment,” SKOLNICK, *supra* note 15, at 167, and that the “designation ‘cleared’ merely means that the police believe they know who committed the offense. . . . It does not indicate . . . how the crime was cleared.” *Id.* at 169. As a telling example of the latter point, Skolnick cites an

job.⁴⁸ It is the prosecutor's job to convict.⁴⁹ Furthermore, if the prosecutor manages to convict in any event (which occurs a good proportion of the time),⁵⁰ even this tenuous aversive impact may disappear.

The usual response to these points is that the prosecutor whose case is lost or damaged by exclusion will in all likelihood lean on the offending officer's superiors, who in turn will punish the offending officer.⁵¹ That brings us to condition #5, that incidental rewards for the undesired behavior should be kept to a minimum. While domino sanctioning of the type just described does take place,⁵² most of the literature suggests that any punitive effect of the rule is usually more than offset by the approbation received by officers who meet their arrest quotas, clear the streets of criminals, and in other ways demonstrate efficiency at crime control. As Jerome Skolnick has observed, "Superiors within the police organization will . . . be in sympathy with an officer, provided the search was administratively reasonable, even if the officer did not have legal 'reasonable' cause to make an arrest."⁵³ When the illegality is not egregious, police chiefs are as likely to protect their own as to sanction them.⁵⁴ If superiors react in this way,

article in which O.W. Wilson's work as head of the Chicago police force was lauded by the public for the "improvement in police efficiency measured by the percentage of offenses cleared by arrest." *Id.* at 167 n.8 (emphasis added). Skolnick does state that clearance rates can also be defined by convictions, but implies that this is rare. *See id.* at 167-69.

48. It is true that some number of searches *follow* arrest and searches incident thereto, presumably with an eye toward obtaining evidence to convict. Additionally, some police agencies, especially at the federal level where the connection with the prosecutor (the Department of Justice) is strong, may well be much more oriented toward securing convictions. In these situations, the rule will presumably have its strongest effect, particularly in terms of providing an incentive to obtain a warrant. Overall, however, these situations represent a very small proportion of all searches and seizures. *Cf.* RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES* 17 (1985) ("[T]he overwhelming majority of criminal investigations are conducted without recourse to a search warrant.").

49. To be more specific about the assertion, the police goal at the time of arrest will usually be the arrest. At some later point in time (e.g., the suppression hearing), the goal may become securing a conviction. Like most of us, police set relatively short-range goals.

50. *See* REPORT BY THE COMPTROLLER, *supra* note 6, at 13 (reporting that in federal cases, a successful suppression motion only reduces probability of conviction from 84% to 54%); VAN DUIZEND ET AL., *supra* note 48, at 42 (reporting that convictions were obtained in at least 12 of 17 cases—70%—in which a motion to suppress was granted).

51. *See* Yale Kamisar, *How We Got the Fourth Amendment Exclusionary Rule and Why We Need It*, 1 CRIM. JUST. ETHICS, Summer-Fall 1982, at 4, 11 ("[T]here is reason to think that 'prosecutorial screening' may be the most effective way of enforcing the *Mapp* rule.").

52. Sometimes it does not even require involvement of the prosecutor. Orfield reports that in the narcotics division he studied, officers with two or more suppressions were demoted or transferred by the department. *See* Orfield, *An Empirical Study*, *supra* note 6, at 1046-47.

53. SKOLNICK, *supra* note 15, at 223.

54. *See id.* at 224 (reasoning that superiors will be sympathetic to patrolmen so long as they act "in conformity with administrative norms of police organization."); Gerald M. Caplan, *The Police Legal Advisor*, 58 J. CRIM. L. CRIMINOLOGY & POL. SCI. 303, 306 n.13 (1967) (describing memorandum from Superintendent O.W. Wilson of Chicago that stated: "I will always support the police officer who, in the performance of his assigned tasks, exercises what he believes to be his legal authority in a reasonable manner"); Heffernan & Lovely, *supra* note 6, at 350 (describing one police executive who stated "he was reluctant to invoke internal discipline against deliberate violators who do not act in a clearly arbitrary fashion and do not cause substantial harm"). There are even reports of police supervisors teaching their officers how to lie in order to ensure

peers are likely to be even more sympathetic, if not laudatory, toward a collar well done.⁵⁵ In behavioral language, the reward of an arrest will often undermine the punitive aspect exclusion brings.

Perhaps if exclusion is not particularly strong punishment, *admission* of constitutionally seized evidence at least offers a positive reinforcement that will change behavior in many cases. Unfortunately, just as exclusion is not much of a punishment, admission of evidence is not much of a reward. If the Fourth Amendment issue is not contested, the exclusionary regime does not even associate the "reward" (e.g., admission of the evidence and conviction) with the good conduct, a fundamental requirement of behavioral theory. In this situation, to the extent a conviction is viewed as a positive reinforcement it will probably be seen as a reward for solving a case, not for solving a case in a constitutional manner. If the issue is contested and the state prevails, the proper association between constitutional conduct and reward is made, but the reward is a strange one: in order to claim it, one must go through an adversarial hearing, an experience which is often not very pleasant.⁵⁶ Furthermore, given the officer's arrest orientation, the reinforcement of a conviction is as attenuated as the punishment visited by exclusion. Although behavioral theory suggests that rewards, in contrast to punishments, need not be meted out after every deserving incident⁵⁷ (thus minimizing the lack of association problem noted above), it does suggest, as with punishments, that when rewards are given they be unalloyed and direct.⁵⁸

evidence is not suppressed. REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (July 7, 1994), reprinted in 4 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS 1894-1994, at 40-41 (Gabriel J. Chin ed., 1994).

55. Cf. JEROME H. SKOLNICK & DAVID H. BAYLEY, COMMUNITY POLICING: ISSUES AND PRACTICES AROUND THE WORLD 49, 50 (Nat'l Inst. Justice 1988) (describing "solidarity or brotherhood" as a central feature of police culture). It is well documented that police are even willing to cover-up or lie for one another. See, e.g., ANTHONY V. BOUZA, THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 72 (1990) (describing, from the perspective of a police commander, the natural tendency to follow a "code of silence" and commenting that "[t]he similarities of the value systems of the police culture and the underworld can be striking").

56. See Orfield, *An Empirical Study*, *supra* note 6, at 1042-43 (noting that police reported distaste at being berated by defense lawyers and judges and "indicated that suppression hearings themselves were a form of punishment").

57. See WILLIAMS, *supra* note 32, at 42 ("People will continue to engage in goal-directed behavior, sometimes for years, because they have been told or know that they will eventually receive reward."). Indeed, to be effective, rewards probably *should not* be granted after each desired event. See COHEN, *supra* note 30, at 55 ("Operant conditioned responses which were acquired by partial reinforcement have far greater resistance to extinction than operant conditioned responses which were acquired by continuous reinforcement.").

58. See WILLIAMS, *supra* note 32, at 34-37 (discussing how variations in quality and quantity of reward correlates with performance). In any event, when the goal is suppression of behavior, punishment tends to be preferred to reward. See *id.* at 169 ("The punishment procedure, primarily because of its known effectiveness, is the method most frequently used to *suppress* behavior."). Note, however, that punishment has significant drawbacks as a behavior modifier, see *id.* at 169-70 (discussing problems with excessive punishment), and that positive reinforcement is often at least as effective, see *id.* at 174 ("Positive reinforcement is by far the most

In deterrence terms, the foregoing discussion has only directly addressed the rule's specific deterrence of the offending officer. It has not addressed what behaviorists call the possibility of "vicarious extinction,"⁵⁹ or what criminal law theorists would call general deterrence of those who have not yet offended. From a behavioral perspective, there is even less reason to believe the rule is effective as a general deterrent. Vicarious punishment or general deterrence only works when there is the perception of real punishment.⁶⁰ As already noted, for many officers the threat of exclusion is very low on the horizon, at least up through the time of the arrest. When police do think about the rule, observational evidence suggests its impact is mitigated by police awareness of the biasing effects of judicial hindsight,⁶¹ the success of perjury,⁶² and the inapplicability of the rule to a large number of situations.⁶³

Perhaps imagining the police officer's incentive structure in a different setting will help make the point. Suppose you are an associate in a large law firm. You receive a salary rather than a case-by-case fee. You principally serve one client, for whom you bring several suits a year against various debtors. It often happens in such suits that the debtors can be enticed to settle quickly through information-gathering practices that verge on the unethical. You know several fellow associates who routinely engage in such practices. Some have been forced to testify in court about their conduct and, in a few cases, the court has found a particular action to be unethical. But in those cases the court

commonly employed procedure in behavior modification."). The implications of these points in the police context are briefly discussed *infra* note 109.

59. See ALBERT BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* 175-92 (1969).

60. See *id.* at 203 ("The occurrence of . . . disinhibitory effects is mainly determined by actual or inferred response consequences to the [modelled event].").

61. See SKOLNICK, *supra* note 15, at 221:

[w]hen a suspect turns out to possess narcotics, the perception of surrounding facts and circumstances about the reasonableness of the arrest can shift in only one direction—against the defendant and in favor of the propriety of the search—even if the facts might have appeared differently had no incriminating evidence been discovered.

62. Several commentators have pointed out that police have little to fear if they lie at a suppression hearing. See, e.g., Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 (relating that he has "seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambiguous tape recordings," and that "[s]ome judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors"); Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596 ("[T]he policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven."); cf. Orfield, *An Empirical Study*, *supra* note 6, at 1049 (reporting that 86% of officers stated that it was "unusual but not rare" for a judge to disbelieve an officer).

63. See Heffernan & Lovely, *supra* note 6, at 351 (concluding, based on empirical evidence assessing officers' attitudes, that "exclusion poses so weak a threat to officers that one must conclude that the more interesting [fact is the] consistent unwillingness of some officers . . . to depart from the Constitution's requirements"); cf. Stephen Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1414 (1986) (detailing the myriad ways the "deterrent threat" of the rule is minimized by the courts' limitations on the rule).

did nothing to the associate; it simply declared that the information obtained through the unethical practice could not be used on behalf of the client. In a couple of those cases, the client went on to win in any event.

Your superiors have never explicitly condoned such practices, but you notice that, outside of one case where the associate actually physically harmed a debtor, they have never sanctioned anyone. In fact, the most well-respected associates in the firm are those who dispose of cases quickly; their methods of doing so are not of much interest to the brass. The few associates who make a point of avoiding unethical actions are viewed as chumps by others in the firm. After all, there is virtually no doubt that the debtors have failed to pay what they owe; why should they get any solicitude? You also know that many of the debtors will have no way of knowing whether any particular information-gathering technique is unethical, that the associate who works with you will protect your backside, and that lawyers who represent debtors often avoid bringing ethics claims because the facts or law are unclear and they have so many cases to handle that they would just as soon use the claim as a bargaining chip to reduce their clients' payment. You are now confronted with a case in which you could follow a route that is ethically questionable but expeditious, and you have other cases backing up. What would you do?⁶⁴

Again, the argument is not that exclusion has no effect on police behavior. It clearly does affect some police some of the time, probably most commonly in "big" cases.⁶⁵ If the exclusionary rule were abolished and nothing were substituted in its place, police misconduct would undoubtedly burgeon because no system of punishment and reward would counteract the tendency to cut investigative corners. Rather, the point is that, as a theoretical matter, exclusion is not a strong behavior-shaping mechanism in the typical search and seizure setting.

2. *Legitimacy-Compliance Theory*

One criticism of behavioral theory is that, because it was developed through studies of animals, it is only fit to be applied to them. As thinking beings, the argument goes, humans do not necessarily need immediate, consistent punishment to be dissuaded from pursuing bad

64. Note that the "exclusionary rule" in this hypothetical is likely to provide *more* deterrence than the Fourth Amendment exclusionary rule because in the latter situation police departments are not as directly harmed as the superiors in the example (who may lose some business if enough cases are lost due to ethics claims), nor is the prosecutor usually as closely connected to the officer as the client is with the hypothesized lawyer.

65. This is the conclusion of both Skolnick and Orfield. See SKOLNICK, *supra* note 15, at 225 ("[T]he rule seems to control police almost in direct relation to the gravity of the crime of the suspect."); Orfield, *An Empirical Study*, *supra* note 6, at 1043 ("It is less clear that the rule deters misconduct in 'small pinch' cases in which . . . the vast majority of suppressions occur . . .").

conduct. In the search and seizure context, this stance might lead one to conclude that the threat of exclusion is a more powerful behavior-shaping mechanism than indicated by the previous discussion of behavioral theory's implications.

A second, more cognitively based theoretical approach to the problem of motivating law-abiding behavior suggests otherwise. The legitimacy-compliance theory developed by Tom Tyler grew out of research on why people obey the law.⁶⁶ He asserts that deterrence is not the only, and may not be the primary, reason people follow legal mandates. Rather, people comply with the law for a complex set of reasons that include cost-benefit analysis (i.e., deterrence), the norms of peers, one's own norms, and the perceived legitimacy of the authorities.⁶⁷ For Tyler, the last reason is the most important for policymakers. Because achieving deterrence is often problematic, and because individual and group norms are hard to change, compliance with the law is often best achieved by assuring respect for it and those who implement it.⁶⁸

Not surprisingly, the best way to reach the latter goal is for legal authorities to appear "fair" to those with whom they interact. Tyler's research suggests that perceptions of fairness hinge on what he calls "procedural justice," which loosely involves whether disputants feel they have been given a voice in the process and are treated with dignity,⁶⁹ but is also closely related to whether people perceive outcomes as fair over time.⁷⁰ Voluntary compliance with the law, even law that goes against personal or group norms, is likely if the process of imposing the law is seen as legitimate in these ways.⁷¹

66. See generally TYLER, *supra* note 27.

67. See *id.* at 56.

68. See *id.* at 67-68. According to Tyler:

In trying to understand why people follow the law . . . we should not assume that behavior responds primarily to reward and punishment (as do traditional theories of deterrence). Instead, we should recognize that behavior is affected by the legitimacy of legal authorities and the morality of the law. Similarly, the literature on implementing policy should not focus simply on manipulating penalties and incentives: it should also be concerned with creating a normative climate that promotes the acceptance of law and public policies.

Id. at 168-69.

69. See generally *id.* at 115-57.

70. Tyler's work suggests that if procedures are viewed as fair, unfavorable outcomes do not necessarily affect compliance with the law. See *id.* at 107. However, he also notes that procedural fairness only insulates the authorities from perceptions of illegitimacy up to a point. See *id.* at 165 ("Fair outcomes are one thing that people expect from a fair procedure, and a procedure that consistently produces unfair outcomes will eventually be viewed as unfair itself."). See generally DANIEL KATZ ET AL., BUREAUCRATIC ENCOUNTERS (1975); H. ANDREW MICHENER & EDWARD J. LAWLER, *Endorsement of Formal Leaders: An Integrative Model*, 31 J. PERSONALITY & SOC. PSYCHOLOGY 216 (1975) (finding that both absolute outcomes and judgments of fairness influence trust in government and its leaders).

71. See TYLER, *supra* note 27, at 63 ("Respondents are almost equally likely to comply with the law because they view it as legitimate, whether they think the likelihood of their being caught is high or low, whether or not they think their peers would disapprove of law breaking, and whether or not they think law breaking is morally wrong.").

Under Tyler's framework, therefore, the extent to which the exclusionary rule can bring about compliance with the Fourth Amendment depends significantly upon its ability to promote a positive view of the judiciary's legitimacy in its endeavors to enforce the Fourth Amendment. Unfortunately, the rule appears to have the opposite effect. Myron Orfield's study describing the reaction of twenty-five officers to suppression of their evidence, although presented in support of retaining the rule, is instructive in this regard.⁷² Three of the officers talked about exclusion as a "learning experience" or in moral terms. But most simply stated they were "upset," "frustrated," "disappointed," or "pissed off" at the exclusion, or were simply fatalistic about the outcome (e.g., "It is part of the job"). Very few sounded contrite or apologetic.⁷³ All also appeared to advocate some type of good-faith exception,⁷⁴ a refrain found in the only other survey that obtained information about this issue.⁷⁵

These types of comments suggest that police perceive the present exclusionary regime to be illegitimate.⁷⁶ Exclusion of probative evidence that allows clearly guilty people to go free undoubtedly causes some resentment among the police. Disregarding the degree of officer culpability is likely to exacerbate that sense of unfairness considerably because then the rule exacts its penalty not only when the officer turns out to be right about the suspect, but even when there was no reason to believe that the collar was bad. Contrary to the assertion of some writers that bitterness about these effects of the rule will have a deter-

72. See Orfield, *An Empirical Study*, *supra* note 6, at 1066-67.

73. See *id.* Moreover, while most stated they would never make the same mistake again, apparently many of them had experienced several exclusions, suggesting that the rule did not, for whatever reason, change their overall Fourth Amendment behavior. See, e.g., *id.* at 1034 (noting that officers found out "90 percent of the time when [their] evidence had been suppressed").

74. See *id.* at 1051 ("When asked whether the exclusionary rule should be kept as is, scrapped, modified to include an across-the-board 'good faith' exception, or modified in some other way, all of the officers responded that the rule should be preserved with a good faith exception.").

75. See Perrin et al., *supra* note 3, at 732 & n.453 (noting that, although not specifically given the option to do so, many officers hedged their support for the exclusionary rule by indicating that a good-faith exception should apply).

76. See J. DAVID HIRSCHL, *FOURTH AMENDMENT RIGHTS* 83-89 (1979) (empirical study indicating that many police, prosecutors, and even defense counsel—but especially the first—view exclusion as excessive compensation); SKOLNICK, *supra* note 15, at 228 ("[Police] do not . . . feel morally blameworthy at having [evidence excluded]; nor do they even accept such injunctions with good grace and go about their business. On the contrary, the police typically view the court with hostility for having interfered with their capacities to practice their craft."). In possible contrast, Loewenthal's interviews and observations of officers, conducted more recently than Skolnick's and at about the same time as Hirschel's, lead him to conclude that police "apparently could not respect courts or a legal system where evidence was accepted no matter how it was obtained." Loewenthal, *supra* note 15, at 30. At the same time, however, he says that "most police are disturbed by cases where defendants benefit from apparent 'technicalities,'" *id.*, and that construing the warrant and probable cause requirements more flexibly "would be likely to evoke considerably more understanding and respect from police officers," *id.* at 39.

rent effect,⁷⁷ Tyler's work suggests the opposite: that under these circumstances police compliance with Fourth Amendment strictures will suffer proportionately. To the extent perceptions of judicial legitimacy diminish, the police's personal and group norms—which usually are hostile to the Fourth Amendment—will come to the fore as influences on police behavior and, given the rule's otherwise weak deterrent impact, may often be dispositive.⁷⁸

3. *The Implications of Theory for Alternatives to Exclusion*

The liberal's typical response to the kind of argument just made is the teenager's refrain: So what's your point? The exclusionary rule may not work all that well, but when the goal is corralling the natural urge of the police to solve crime as efficiently as possible, what works better? The usual proposed alternatives to the exclusionary rule are some type of damages action and internally imposed sanctions. Many writers have argued that there are significant flaws in both types of remedies.⁷⁹ They are right. Police-imposed sanctions, while in theory perhaps the best way of ensuring compliance,⁸⁰ in practice have foundered for reasons already suggested: police superiors have a hard time punishing hard-working cops for mistakes made at the margin, at least when there is no external pressure to do so.⁸¹ Damages actions, at least as presently constituted, also are not much of a deterrent, given their paucity and low likelihood of success. The major contention of this part of the article, however, is that, with significant modifications borrowed from an administrative law model, a damages remedy is far

77. See Orfield, *An Empirical Study*, *supra* note 6, at 1042-46; Mertens & Wasserstrom, *supra* note 2, at 395.

78. Perhaps Skolnick's observation sums up this point best:

[The police] culture sees the [exclusionary] rule as something to be observed rather than obeyed; it is an unpleasant fact of life, but not a morally persuasive condition. The policeman, as a tactical matter, recognizes an obligation to appear to be obeying the letter of the law, while often disregarding its spirit.

SKOLNICK, *supra* note 15, at 228.

79. The classic description of the inefficacy of tort remedies is Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). Many have repeated his points and added to them. See Amsterdam, *supra* note 2, at 429-30; Maclin, *supra* note 2, at 65; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283-86 (1988); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1386-96 (1981); Yeager, *supra* note 2, at 139-52. Critics of police sanctions include Edward J. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 U. DET. J. URB. L. 5 (1981), and Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 787-94 (1993) (detailing failures to discipline police despite clear evidence of misconduct).

80. Professor Amsterdam has made the best argument in this regard. See Amsterdam, *supra* note 2, at 423-49.

81. It has even been suggested that police supervisors prefer an external sanction system as a way of maintaining authority over their officers. See SKOLNICK, *supra* note 15, at 226 ("[T]he principal effect [of giving greater authority over searches and seizures to supervisors] might be reduction of cohesion and morale in the police organization itself.").

superior to the exclusionary rule from both the behavioral and legitimacy-compliance perspectives.

Beginning with the behavioral perspective, consider the potential advantages of a damages remedy as compared to the exclusionary rule. Because a damages suit can be brought even when no prosecution occurs or when the prosecution ends in a plea bargain, it permits a more consistent response to illegal actions than does the exclusionary rule. Because damages can be imposed directly on the offending officer or on his or her employer, the punishment is always communicated to the culprit, and the punishment is significantly more powerful than exclusion. In theory, then, a damages remedy implements behavioral principles much more efficaciously than does the exclusionary rule.

Unfortunately, the potential advantages of civil suits are seldom realized. Such suits are few and far between,⁸² and therefore relatively punchless as punishing mechanisms, for a number of reasons: potential plaintiffs' ignorance of their rights and fear of police reprisals; the expense of civil litigation; the obstacles created by incarceration; and the inchoate nature of the injury (which deters lawyers as well as potential plaintiffs from bringing suit).⁸³ Those suits that are brought are seldom completely successful,⁸⁴ again for a number of reasons: the good-faith defenses available to officer-defendants;⁸⁵ the unsympathetic nature of many plaintiffs (who are often criminals, or at least associated with criminality);⁸⁶ the biases of juries;⁸⁷ and, as with exclu-

82. A suit for a violation of the Fourth Amendment may be brought directly under the Constitution for federal officers, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and against state officers under 42 U.S.C. § 1983 (1994). According to a survey of civil actions in 1976, there were approximately 10,200 suits against police officers, or 19.6 per 1,000 officers, 5.4% (about 600) of which involved illegal searches or invasions of privacy (affecting 1 in every 1,000 officers). *See Wayne W. Schmidt, Section 1983 and the Changing Face of Police Management*, in WILLIAM A. GELLER, *POLICE LEADERSHIP IN AMERICA* 226, 228 (1985). In 1986, the Justice Department found "fewer than three dozen reported fourth amendment cases [under § 1983] over the past 20 years." OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, *reprinted in* 22 MICH. J.L. REF. 573, 630 (1989). In the first 10 years of litigation under *Bivens*, reportedly only 13 plaintiffs out of 13,000 secured judgments. *Federal Tort Claims Act: Hearings on S. 1775 Before the Senate Judiciary Comm., Subcomm. on Agency Admin.*, 97th Cong. 137, 142 (1982) (statement of Donald Devine, Director, U.S. Office of Personnel Management).

83. *See Meltzer, supra* note 79, at 284, for a summary of these problems.

84. *See Theodore Eisenberg, Section 1983: Doctrinal Foundations and An Empirical Study*, 67 CORNELL L. REV. 482, 550-51 (1982) (success rate of 21%); Note, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 790 tbl.1 (1979) (defendants successful in 20 of 28 suits).

85. *See generally Anderson v. Creighton*, 483 U.S. 635 (1987) (good-faith exception under § 1983); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (good-faith exception under *Bivens*).

86. *See Jonathan D. Casper et al., The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 LAW & SOC. INQUIRY 279, 282-303 (1988) (controlling for other variables, juror knowledge of plaintiff's guilt or innocence had a significant effect on punitive damage award and on whether any compensation was awarded at all).

87. *See Note, supra* note 84, at 791-802, 814 (describing, based on a survey of 149 § 1983 cases, biases against plaintiffs based on their race, financial resources, sexual orientation, past record, and lifestyle, as well as biases in favor of police; the authors concluded that "jurors disfavored plaintiffs who were nonwhite or nonmiddle class, or who had previous brushes with

sion, the efficacy of police perjury.⁸⁸ Even if the officer loses, he or she is often indemnified, judgment proof, or both, minimizing the impact of the verdict on the officer.⁸⁹

Virtually all of these problems are correctable, however. Behavioral theory would suggest that a workable damages remedy should have, at a minimum, three attributes: (1) a process that facilitates bringing all legitimate claims; (2) an adjudicative procedure that ensures legitimate claims will prevail; and (3) a remedy sufficiently non-trivial to constitute a meaningful punishment. An outline of a damages regime that possesses all three attributes will be sketched out here for the purpose of comparing it to the exclusionary rule; further elaboration of the proposal and variations on it will come later. Because the proposal has some elements of tort law I will continue to refer to it as a "damages" system, although in many respects it more closely resembles an administrative fine process.

How can we make sure that most viable search and seizure claims are litigated? As we have seen, the exclusionary rule is inadequate because it is only triggered by prosecution and even then does not ensure the Fourth Amendment issue gets to court. But it at least provides a strong incentive for criminal defendants to raise the issue in those cases not resolved through an early plea, as well as a lawyer to help when, as is often the case, the claimant is indigent. In contrast, mounting a civil action seeking damages based on vague claims of privacy or autonomy violations can be a task that seems daunting, futile, or both, to both victims and their potential (contingent fee?) lawyers.

If, on the other hand, the action were brought by a state-paid lawyer in a bench trial that could impose liquidated damages for inchoate constitutional violations (as well as compensatory damages for physical or property injury), these obstacles are largely overcome. The lawyer could be part of an administrative agency, as proposed by Professor Perrin and his colleagues,⁹⁰ or come from a "fourth-branch" ombudsman's office that has larger oversight functions, as proposed by Professor Robert Davidow.⁹¹ Such an entity would both solicit and

the law" and "favored police officers because they were viewed as respectable people performing a difficult and necessary job"); see also Steiker, *supra* note 2, at 850 ("Juries will often fear the robbers more than the cops because the robbers tend to be mostly poor and/or members of minority groups and because the cops tend to focus their attentions on just such disfavored groups.").

88. See generally Patton, *supra* note 79, at 763-64 (describing the difficulties of bringing suit under § 1983, including overcoming code of silence).

89. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (in no cases studied in one federal jurisdiction did the individual officer bear the cost of an adverse verdict); Note, *supra* note 84, at 811 (indemnification in 147 of 149 cases).

90. See Perrin et al., *supra* note 3, at 743-54.

91. See generally Robert P. Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973) (proposing an ombudsman to enforce constitutional restrictions on the actions of both state and federal law enforcement

evaluate Fourth Amendment claims; more importantly, it would pursue nonfrivolous claims regardless of the claimant's financial straits or criminal status.⁹² The efficiency of a bench trial would curtail litigation and time costs, further facilitating suits.⁹³ And the availability of liquidated damages should provide incentive to sue in at least some cases in which "only" constitutional injury occurs (although even in those cases where the victim is uninterested in a suit, the state-supported agency could initiate one, thus ensuring that a large number of legitimate claims will be brought).⁹⁴

To ensure the consistent punishment demanded by behavioral theory, however, the action must not only be brought but must also be successful in legitimate cases. As noted above, there are three principal obstacles to achieving this goal in the typical civil action against an individual officer—police perjury, unsavory plaintiffs, and the good-faith defense. The impact of the first two can be minimized, while the third probably will not undercut the punishment effect.

Many have plausibly asserted that a damages regime, where the officer's own finances are on the line, is at least as likely to encourage perjury as the exclusionary rule.⁹⁵ But note that the only person who benefits from "testilying" in a damages action is the offending officer. When exclusion of evidence is the likely outcome, on the other hand, judges, prosecutors, and fellow police all have some independent "stake" in the result, and subtle or not-so-subtle collusion with a

agencies). For similar proposals, see Barnett, *supra* note 3, at 969-80; Peterson, *supra* note 3, at 62.

92. It would also avoid another practice that undermines the efficacy of civil damages actions today: dismissal of charges in return for an agreement not to sue. *Cf.* Town of Newton v. Rumery, 480 U.S. 386, 390, 397-98 (1987) (sanctioning such agreements so long as the defendant is not coerced); Dripps, *supra* note 2, at 628-29. The agency would have no authority to dismiss charges and presumably could not be importuned by the prosecutor to do so.

93. Whether punishment would be as immediate as that imposed by a suppression hearing will depend upon two factors. First, an argument might be made that, when the complainant is also charged with a crime, the civil proceeding must await the outcome of the criminal trial to avoid violation of the Fifth Amendment. *Cf.* Barnett, *supra* note 3, at 976. A rule similar to that governing suppression hearings, to the effect that statements made during the suit are not admissible at trial, should take care of this problem. *See* Simmons v. United States, 390 U.S. 377, 392-94 (1968). The second factor is whether discovery and other preliminary matters will take longer than is usual with a suppression hearing. As noted earlier, suppression hearings in cases that go to trial often occur months after arrest, *see supra* note 44, while those suppression hearings that take place during plea negotiations often occur *too* early to permit good discovery. *See supra* note 37. In the latter cases, the "punishment" exacted by a civil suit might not be as immediate, but will be more likely to occur.

94. The thousands of mostly unheeded complaints that are currently made to police departments would now go to the agency. *Cf.* Littlejohn, *supra* note 79, at 43 (noting that only 15% of over 1,750 complaints per year about arrest, entries, searches, harassment, and property damage brought any disposition from the police department).

95. *See, e.g.,* Orfield, *An Empirical Study*, *supra* note 6, at 1055; Kevin R. Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1071 (1996); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1383 & n.175 (1981).

cover-up is thus more likely to occur.⁹⁶ Most importantly, the judge presiding in the civil action, in contrast to the suppression hearing judge, will not be worried that crediting the plaintiff's story will result in a guilty person going free; indeed, complainants may not even be charged with a crime, which will enhance their overall credibility vis-à-vis the police. Under such circumstances, police perjury will be less successful and thus less likely to occur. It may also be curbed because prosecutors no longer dependent upon perjury to make their cases may feel less constrained in prosecuting it.

That the proposed decisionmaker is a judge, rather than a jury, should also mitigate the second drawback of the typical civil action—the difficulty juries have in providing damages to people accused of crime.⁹⁷ Although, as just noted, judges are not immune from biasing effects, their legal training is likely to make them better than laypeople at ignoring the plaintiff's status. Furthermore, judges are repeat players under the proposed system, and thus will be delivering verdicts both in cases involving criminals and those uncharged with crime. Not only will judges know their probity will be questioned if the guilty receive less justice than the innocent; they may view the former group more favorably once they see concrete evidence of Fourth Amendment violations harming the innocent.⁹⁸ The additional fact that, under the proposed procedure, plaintiffs will be represented by a state-paid attorney rather than a contingent-fee lawyer will probably further undercut bias against those plaintiffs who have tangled with the law.⁹⁹

Even with these modifications, many officers who have violated the Constitution will avoid liability if the good-faith defense recognized in the typical civil action is maintained. This escape from liability is not fatal to the relative efficacy of the damages action, however. First, of course, elimination of the good-faith defense would not deter illegal actions officers believe to be legitimate any more than the exclusionary rule does. Furthermore, if behavioral change is the goal, elimination of the good-faith defense would be a bad idea for two reasons, both of which stem from the intuition that officers should not be "punished" for inadvertent violations of the Constitution. First, behaviorists recognize that to be effective, punishment must be modu-

96. See Slobogin, *supra* note 40, at 1045-48; see also Orfield, *Heater Factor*, *supra* note 6, at 109-11 (reporting that 52% of judges, prosecutors, and defense attorneys surveyed believed that at least "half of the time" the prosecutor "knows or has reason to know" that police fabricate evidence during suppression hearings, and 93%, including 89% of the prosecutors, stated that prosecutors had such knowledge of perjury "at least some of the time"; about half thought prosecutors "tolerate" such lying and 15% thought prosecutors "encourage" it).

97. See *supra* note 87. As to whether this approach violates the Seventh Amendment, see *infra* note 244.

98. For elaboration on this point, see *infra* text accompanying notes 174-79.

99. See Casper et al., *supra* note 86, at 293-95 (finding that replacing the private attorney with a government lawyer had a small effect on damage awards).

lated; it should not create feelings of low self-worth, resentment toward the punisher, or emotional distancing.¹⁰⁰ These may well be the effects of “punishing” officers for every inadvertent constitutional violation they commit.¹⁰¹ Second, as developed below in the discussion of legitimacy-compliance theory, retention of the defense, in and of itself, should have a positive impact on compliance.

The final goal of a workable damages action from a behavioral perspective is ensuring that punishment of individual officers who act in bad faith is meaningful (without being, as indicated above, demoralizing). If the punishment imposed on the officer can be shrugged off, little good will come of it. The liquidated damages aspect of the proposal plays an important role here. While proponents of a liquidated damages remedy usually advance it as a means of encouraging victim cooperation in the civil action,¹⁰² this motivation plays only a secondary role in the regime proposed here, because the system relies on state-paid advocates. The more important function of liquidated damages from a behavioral perspective is to ensure that the miscreant officer experiences a potent penalty. For this reason, the extent of such damages should be proportionate to the typical officer’s salary,¹⁰³ rather than based, as some have suggested, on the purported “worth” of a constitutional right or a schedule of minimum liquidated damages based on some other abstract calculus.¹⁰⁴

The primary threat to assuring liquidated damages and other damages are effective as punishment is not difficulty of measurement, but indemnification. If the department routinely covers officers’ liabil-

100. See COHEN, *supra* note 30, at 42 (“Punishment is moderately useful for the practical control of behavior; it is acceptable completely only in circumstances where its emotional and suppressive side effects are tolerable.”); WILLIAMS, *supra* note 32, at 169-70.

101. Recall that behavioral theory also recommends that incidental rewards for bad behavior be avoided. See *supra* text accompanying notes 33, 52-55. One might argue that retention of a good-faith defense allowing officers to avoid direct liability, combined with both departmental pats on the back of the type described earlier and the fact that conviction is more likely, could produce a reward system that would be inimical to punishment. Both of the hypothesized rewards are likely to be nonexistent or very incidental, however. Under the system proposed here, departments would still be liable for good-faith violations of the Constitution. Departments are less likely to explicitly reward a violator who has cost them money (although, to ensure they do not do so, additional limitations on indemnification, etc. can be adopted, as discussed *infra* text accompanying notes 225-26). Further, a conviction’s attenuated connection with the officer’s job, see *supra* note 47, suggests it is unlikely to undercut substantially the punitive effect of being sued individually, albeit unsuccessfully, and being responsible for one’s department having to pay money damages.

102. See Posner, *Excessive Sanctions*, *supra* note 22, at 639 (“The minimum damages figure should optimally be set at the level that would induce just enough people to sue to make the total damages obtained equal to the total social costs inflicted by the police misconduct.”).

103. See Davidow, *supra* note 3, at 963 (recommending that the officer would be liable for up to “1.5% of the annual gross income of someone working fifty weeks and earning the minimum wage, for each offense”).

104. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 117 (1983); *supra* note 102.

ity,¹⁰⁵ the punishment and deterrent effect of civil actions may be diminished considerably. Professor John Jeffries has asserted that the mere pronouncement by a court that one knowingly violated the Constitution imposes a stigma that officers find aversive.¹⁰⁶ At the same time, the impact of such a verdict may not be "intense" enough if the department immediately foots the bill. Accordingly, elimination of indemnification, or creation of a mechanism that has a similar effect,¹⁰⁷ may be necessary.¹⁰⁸

Behavioral theory thus suggests a number of modifications to the typical damages scheme that, if adopted together, should produce an enforcement system far superior to the exclusionary rule.¹⁰⁹ Legitimacy-compliance theory's principal contribution to modelling an alternative damages remedy has already been alluded to and can be much more quickly stated. Again, the important insight of that theory is that the best path to compliance is to maximize the perception among police that the authorities administering the sanction system are fair. The exclusionary rule fails in this regard because it sanctions all unconstitutional conduct, whether in good faith or bad. The damages action advocated here, on the other hand, sanctions only the latter. Thus, according to Tyler's theory, police should accord the outcome of the verdicts in civil actions more respect. That respect, in turn, should increase willingness to comply with the Fourth Amendment's dictates.¹¹⁰

4. Summary

Behavioral theory suggests that the exclusionary rule is not very effective in scaring police into behaving. Legitimacy-compliance the-

105. Commentators are in conflict over the frequency of indemnification. Compare John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998) (reporting indemnification of police is routine), with SCHUCK, *supra* note 104, at 85 ("[I]ndemnification . . . is neither certain nor universal.").

106. See Jeffries, *supra* note 105, at 51 n.17.

107. See *infra* text accompanying notes 225-26 for a suggestion in this regard.

108. A separate problem is the indemnifying effects of insurance. It is not clear that government officials can buy insurance to cover their discretionary actions. See SCHUCK, *supra* note 104, at 85. Even if they can, analogous to the approach to intentional torts, most policies presumably would not cover knowing or reckless violations of the Constitution. See *id.*

109. The behavioral focus in this article has been and will be punishment. Behavioral theory also strongly suggests that rewards for constitutional behavior can be even more effective at changing behavior. See *supra* note 58. Whatever regime is chosen, occasional reinforcement of conduct that respects Fourth Amendment values, through bonuses, promotions, etc., will likely have a positive effect on compliance. See generally Batey, *supra* note 3, at 252-54; Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25 (1978) (describing reinforcement techniques in the police context).

110. Of course, the exclusionary rule could be partially salvaged with a good-faith exception as well. But then its systemic effect would be reduced to virtually nothing, because departments would have no incentive to provide any but the most nominal training. See Stanley Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 33 VAND. L. REV. 1511, 1551 (1983) ("The good faith exception . . . is inconsistent with the goal of systemic deterrence.").

ory suggests further that the police are likely to believe the rule (and the Fourth Amendment doctrine it serves) *deserves* to be circumvented. In other words, the rule not only is bad at discouraging violations of the Fourth Amendment but may in an indirect way encourage them. These theories also suggest that a judicially administered damages regime that combined legal assistance with liquidated damages and individual liability for bad faith violations would fare significantly better at changing behavior at the individual officer level. Such a regime would exact more consistent punishment without appearing unfair to the people we hope will want to abide by constitutional mandates.

As noted earlier, empirical attempts to verify or rebut these various points have foundered for a number of reasons, including the difficulty of developing an objective criterion for measuring the number of illegal searches and the impossibility of conducting meaningful comparison studies.¹¹¹ But we do have useful information from the most well-informed source on these topics—the police themselves. That source suggests both that the rule is an ephemeral punishment and that more direct sanctions would be less so.

One study that directly asked police how much unconstitutional activity occurs under the present exclusionary regime provides powerful support for the assertion that the rule is not very effective. The study asked over 200 officers from a city police department and a county sheriff's office in the southeastern United States how often they had conducted illegal searches.¹¹² Of the officers who had conducted searches, nineteen percent said they conducted searches of "questionable constitutionality" at least once a month, and four percent said they conducted searches they *knew* to be unconstitutional at least once a month.¹¹³ As the authors of the study indicate, these numbers likely underreport the amount of illegal activity.¹¹⁴ Even taken at face value, they reveal that, in just these two modest-sized jurisdictions (out of over 15,000 nationwide¹¹⁵), several hundred (perhaps over 600¹¹⁶) constitutionally suspect searches take place

111. See *supra* text accompanying notes 6-21.

112. See Akers & Lanza-Kaduce, *supra* note 6, at 3.

113. See *id.* at 4 & tbl.1.

114. See *id.* at 4.

115. According to the U.S. Department of Labor, there were 17,000 federal, state, special, and local police agencies in the United States in 1994. U.S. DEP'T LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 304 (1996).

116. If each of the confessing officers worked alone, the monthly numbers reported in the text would add up to 636 clearly illegal or questionably legal searches and seizures. Because it is likely at least some of the officers were teamed with one another, that number would be inflated, however. At the same time, the fact that a few of the officers said they conducted bad or questionable searches *more* than once a month would ratchet the number up again. Further, for obvious reasons, this type of survey cannot determine the number of searches and seizures in which the officers *unknowingly* violated the Constitution, which is likely to be high as well. See *infra* note 130. It is possible that many of the constitutional violations reported in this study resulted in exclusion, but the authors provide no information on this point, and the fact that

each year. That is not good news for advocates of the exclusionary rule.¹¹⁷

Of course, this finding does not tell us whether things would be different under alternative systems. In this regard, another set of findings based on surveys of the police is instructive. This research indicates that, when asked what type of remedy they prefer, police consistently state they want the *exclusionary rule*, not a damages remedy, internal sanctions, or other forms of direct sanction;¹¹⁸ indeed, one study found that for most officers exclusion is even preferred over more *training*.¹¹⁹ Apparently, police feel that, of all possible sanctions for Fourth Amendment violations, the rule imposes the fewest restrictions on their actions (while at the same time many of them feel resentful about it on the few occasions it does apply). That type of finding is reminiscent of suggestions that *Miranda v. Arizona*¹²⁰ has been co-opted by the police because it represents only a minor obstacle to obtaining confessions while at the same time providing a legitimizing cover for suspect police practices.¹²¹ In both cases, liberals might do well to reconsider whether their panaceas are achieving their instrumental goals.

B. Impact on Police Institutions: Systemic Deterrence

Many proponents of the exclusionary rule appear to concede that it is not a particularly good general or specific deterrent but argue that it has been successful at encouraging police departments to worry about Fourth Amendment law, a concern which inevitably permeates

officers were willing to state they engaged in illegal or questionable searches on a monthly basis suggests an ongoing, undeterred problem.

117. See Heffernan & Lovely, *supra* note 6, at 348 (reporting that 15% of the officers surveyed indicated they "deliberate[ly] disregard" the Fourth Amendment despite the exclusionary rule).

118. See Orfield, *An Empirical Study*, *supra* note 6, at 1051-53 (all of the narcotics officers interviewed opposed elimination of the exclusionary rule and preferred it to a damages system); Perrin et al., *supra* note 3, at 65, tbl.7 (reporting that 57% chose exclusion above all alternatives, while 36.5% chose education, and the rest chose criminal prosecution, fines, police discipline, or damages).

119. See Perrin et al., *supra* note 3, at 733 tbl.7.

120. 384 U.S. 436 (1966).

121. The statements of one commentator about the effects of *Miranda* might well be applicable to the exclusionary rule:

While *Miranda* appears to be partly responsible for the dramatic decline in coercive questioning practices in the 20th century [just as *Mapp* has undoubtedly curbed the most egregious evidence-gathering practices], American police have responded to the *Miranda* requirements by developing sophisticated interrogation strategies that are grounded in manipulation, deception, and persuasion. These new methods appear to be just as effective as the earlier ones that they have replaced. . . . Not only have the *Miranda* warnings exercised little or no effect on confession rates [just as a only a small percentage of convictions are lost due to exclusion, see *infra* note 364] but police have also embraced *Miranda* as a legitimating symbol of their professionalism. *Miranda* warnings symbolically declare that police take individual rights seriously.

Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 *LAW & SOC'Y REV.* 259, 284-85 (1996).

through the ranks.¹²² As Professors William Mertens and Silas Wasserstrom describe this latter point:

[E]ven if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward fourth amendment rights, police departments are not likely to share such a view, at least officially. Thus, at least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures and arrests.¹²³

Mertens and Wasserstrom coined the phrase "systemic deterrence" as a way of describing this concept of osmosis.¹²⁴

The exclusionary rule is undoubtedly responsible for some degree of systemic deterrence, as evidenced by the post-*Mapp* advent of training programs on the Fourth Amendment where none previously existed.¹²⁵ But whatever the "official" view of the "professional" police department is, in reality training and follow-up administrative rules are generally not effective in implementing the Fourth Amendment. For instance, after surveying a large number of training programs in the heyday of the exclusionary rule, Stephen Wasby concluded that "[r]ecruit training is sadly lacking in criminal procedure content" and that "[t]he picture concerning in-service training is, if anything, worse than that for pre-recruit and recruit training."¹²⁶ He also noted that "[t]he spirit and tone of communication about the law, particularly when the law is favorable to defendants' rights, is often negative, with the need for compliance stressed only infrequently."¹²⁷ Other research has arrived at similar conclusions.¹²⁸

122. See, e.g., *United States v. Leon*, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting): [T]he deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.

See also Yale Kamisar, *Remembering the Old World of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 559 (1990) (arguing that primary effect of exclusionary rule is systemic deterrence); 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, 1400 (1983) ("[T]he exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment.").

123. Mertens & Wasserstrom, *supra* note 2, at 399.

124. See *id.*

125. See Kamisar, *supra* note 122, at 557-59.

126. Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461, 464-65 (1978).

127. *Id.* at 466.

128. See, e.g., REPORT ON THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMITTEE 75 (Jan. 1992) ("Many officers admitted to the Committee that they have stopped going

Even if good programs existed, their impact would be scuttled by behavior in the field. Once out on the streets, the officer is often told to forget what was learned in the academy.¹²⁹ The result, as indicated in several studies,¹³⁰ is that the police are not very well versed in Fourth Amendment law and are generally apathetic about or hostile to what they do know. This type of finding is the death knell for enforcement of the Fourth Amendment.

In short, the systemic deterrent effect of the exclusionary rule is just not powerful enough to overcome a police culture that is unsympathetic to rules that restrict investigative power. But would alternatives to the exclusionary rule fare any better at changing this deeply ingrained resistance to learning and applying constitutional doctrine? Putting the question another way, would other sanctions be more likely to provide the incentive for police departments and governments to seek the hiring policies, leadership skills, and organizational structure that will facilitate systemic deterrence?

Internal sanctions are a poor candidate for this job, for obvious reasons. Damages actions, on the other hand, might be effective if the *department* were made liable for Fourth Amendment violations. Departmental damages could be calculated in a number of ways. One scheme is to hold the department liable only if the individual officer is not liable (because of good faith) and to limit the amount of entity liability to what the individual officer would have had to pay (had there been bad faith).¹³¹ Another is to mandate departmental liability even in bad-faith cases, with the department either sharing liability with the officer or providing an additional sum. The rationale for these arrangements, as well as a few variations on them, are explored below.¹³²

to in-service training, which indicates, among other things, that many officers patrolling the streets of Boston do not know recent changes in the law.”); Quick, *supra* note 109, at 30 (“The law enforcement officer is trained to acquire attitudes reflecting the primary emphasis of the training—crime control.”).

129. See REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT 125 (1991) (describing “the much-reported statement to probationary officers: ‘Forget everything you learned at the Academy’”); Quick, *supra* note 109, at 30 (“Once outside the academy, those officers who may feel a duty to safeguard individual rights will encounter a police environment that discourages that duty.”).

130. See Heffernan & Lovely, *supra* note 6, at 333 (reporting study involving over 450 officers in which subjects gave correct answers to four out of six Fourth Amendment questions only slightly more frequently than chance would dictate and that for only one question did “a substantial majority” correctly evaluate the legality of the intrusion); Hyman, *supra* note 45, at 47 (finding, based on a test on Fourth Amendment rules, that the “average officer did not know or understand proper search and seizure rules” and that “supervisors or senior officers only achieved slightly improved scores”); Perrin et al., *supra* note 3, at 727 (“The responses [of 296 officers] to the questions demonstrate the participants’ widespread inability to apply the law of search and seizure or police interrogation.”).

131. See Davidow, *supra* note 91, at 339.

132. See *infra* text accompanying notes 143-58; 225-26.

Whatever the specific entity liability system, there are several reasons to believe it would create a powerful incentive for police departments to ensure compliance with Fourth Amendment law through more vigorous training programs, systematic rules, and other bureaucratic admonitions to take Fourth Amendment rights seriously. First, such a system is based on the time-tested theory underlying liability of organizations in tort, administrative, and criminal law. Although entity liability has by no means demonstrated consistent deterrent effects,¹³³ these sanctioning regimes have had some successes in motivating organizations to change behavior.¹³⁴

Second, economic analysis, which is more apposite in the institutional setting discussed here than when trying to predict the behavior of individual officers in the field, suggests that organizational liability should work relatively well in connection with police departments. Professors Larry Kramer and Alan Sykes note, for instance, that compared to many government agencies, police bureaucracies face relatively low transaction costs in initiating and enforcing effective incentives to abide by the Fourth Amendment.¹³⁵ Because most police officers are wedded to their jobs and care about their departmental status, they respond to standardized rewards and punishments.¹³⁶ Further, these officers are well understood by their supervisors, "making it easy to design training programs and police manuals that establish detailed guidelines for line officers to follow."¹³⁷ Accordingly, "vicarious liability will likely motivate municipalities to adopt a variety of cost-effective devices to reduce the incidence of police malfeasance."¹³⁸

Finally, there is some patchy empirical evidence directly supporting the assertion that entity liability can affect police institutions. Two of the best indicia of systemic deterrence are quality training and the

133. See, e.g., Richard J. Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1295-1300 (1980); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 568, 572 (1985).

134. According to the ALI's examination of empirical studies in 1991, the tort system alone "appears to fail badly" as a prevention device, but entity liability imposed through administrative regimes similar to that proposed here can be moderately successful at reducing some types of accidents. See 1 AMERICAN LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 441-43 (1991). This combination has been most successful at preventing workplace accidents, see *id.* at 428-31, and least successful at reducing environmental pollution, the latter primarily because of difficulties in proving scientific causation and in showing that a particular defendant caused the injury, see *id.* at 441-43. "Causation" problems normally do not afflict search and seizure adjudication, and identifying the offending officer is rarely a problem.

135. See Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 287-94.

136. See *id.* at 290-91.

137. *Id.* at 291.

138. *Id.* In contrast, Kramer and Sykes conclude, such liability will do little to ameliorate illegal hiring and firings by municipal lawyers because their occupational mobility and the difficulty nonlegally trained supervisors experience in determining the basis of their personnel decisions significantly raises the transactions costs of establishing an incentive system. For further analysis of this issue along economic lines, see Posner, *Rethinking*, *supra* note 22, at 64-68.

existence of departmental rules that result in sanctions.¹³⁹ As noted earlier, for most aspects of Fourth Amendment law, neither exist. There is one exception, however. The single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force, which happens to be one of the few domains where the police are successfully sued for large sums of money.¹⁴⁰

Unfortunately, the current damages regime is not likely to catch the attention of the typical police department because, as with individual officer liability, adverse verdicts against the government are rare (at least outside the use of force context).¹⁴¹ The changes already proposed, including state-provided legal assistance, liquidated damages, and bench rather than jury trials, should go a long way toward improving this situation.¹⁴² But two other modifications to the current damages regime are necessary if such actions are to have a fighting chance at effecting systemic deterrence.

The first change concerns the *vicarious* liability standard. One such standard makes departmental liability contingent on proof that the department somehow endorsed the illegality, as *Monell v. Depart-*

139. See Kramer & Sykes, *supra* note 135, at 291; Mertens & Wasserstrom, *supra* note 2, at 399.

140. See SAMUEL WALKER, TAMING THE SYSTEM 25-28 (1993) (stating that “[t]he control of deadly force is arguably the great success story in the long effort to control police discretion” and that “[e]ach change in a police department shooting policy was the result of conflict . . . involv[ing] a highly questionable shooting, community protests, and often a lawsuit”); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 362-63 (1986) (noting that while “[m]any police departments have detailed rules governing the use of deadly force, a handful have rules regarding the handling of domestic violence, and some have rules covering intelligence-gathering activities,” rules governing other areas are rare; further, “most of the existing rulemaking is the result of some external compulsion: litigation, political pressure, or a combination of the two”).

In arguing against a damages regime, Professor Maclin has noted that the Los Angeles Police Department paid millions of dollars from 1986 to 1990 to settle 300 excessive force lawsuits, and rhetorically asked: “Did such large sums stop LAPD officers from brutalizing Rodney King . . . ?” Maclin, *supra* note 2, at 62. Apparently the LAPD made a decision that it was willing to pay for what it believed was “effective law enforcement.” With that kind of lawless attitude, no sanctioning system will work in excessive force cases; clearly the exclusionary rule will not be successful (because often, as in the King case, there is no evidence to exclude). But most police departments are not like the LAPD of the late 1980s. Writing in 1985, Schmidt concluded that civil liability for use of force was the “primary factor” behind increased use of risk prevention techniques, including: (1) increased employment of “risk managers and loss prevention consultants” such as “police legal advisers,” who were associated with more than 300 departments; (2) better screening of police recruits through psychological tests; (3) enhanced recruit training programs beyond state-mandated minimum levels; and (4) increased supervisor accountability for the negligent actions of their subordinates, which “reduces favoritism or bias and cover-ups and promotes certainty in the disciplinary process.” Schmidt, *supra* note 82, at 232-33.

141. See *supra* note 82.

142. See SCHUCK, *supra* note 104, at 184 (arguing that, under a damages regime involving counsel fee awards and minimum damages, government “[a]dministrators would . . . be pressed to anticipate and respond to low-level misconduct by deploying their stock of behavior-shaping resources—rules, training, discipline, incentives, information, organization support, and the like—in more imaginative and powerful ways”).

*ment of Social Services*¹⁴³ requires in section 1983 cases by immunizing municipalities for actions of their agents not approved by a “policy or custom.”¹⁴⁴ Alternatively, the standard could be one of simple negligence on the part of the department (e.g., proof of inadequate training, supervision, and the like). Finally, vicarious liability might be based on a respondeat superior, or strict liability, theory. Adoption of either of the latter two standards obviously runs afoul of significant Supreme Court and lower court precedent restricting government liability for the actions of federal, state, and local officials under current remedial statutes.¹⁴⁵ As several commentators have argued, however, many of these decisions are based on questionable interpretations of the relevant statutory and constitutional law,¹⁴⁶ and in any event Congress could pass a statute that removed such restrictions.¹⁴⁷

On the assumption these obstacles can be removed (if appropriate to do so), the more important question is which vicarious liability standard is best as a matter of policy. Clearly, *Monell’s* approach is the weakest in deterrence terms. As construed by the Court, *Monell’s* policy and custom defense permits police departments to escape liability in virtually every Fourth Amendment case; only searches and seizures approved by a policy-making body, ordered by an upper level government official,¹⁴⁸ or caused by intentionally inadequate training¹⁴⁹ support a damages action against the department.

143. 436 U.S. 658 (1978).

144. *Id.* at 694 (holding government liable under § 1983 only when pursuant to the “execution of a government’s policy or custom . . . made by . . . lawmakers or by those whose edicts or acts may fairly be said to represent official policy”).

145. *Monell*, for example, substantially limits the liability of municipalities. See 436 U.S. at 694; see also *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (requiring “deliberate indifference” toward the need for training for municipal liability under § 1983). State liability under § 1983 is nonexistent. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (holding that § 1983 is not a sufficiently clear expression of congressional intent to abrogate state sovereign immunity in federal court); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65-66 (1989) (holding that states are not “persons” within the meaning of that statute even when sued in state court). The federal government is only liable for constitutional violations to the extent Congress decides to waive sovereign immunity. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

146. Attacks on *Monell’s* interpretation of § 1983 have been particularly vociferous. See, e.g., Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 765 (1992) (“[N]either the language nor legislative history of § 1983 support the Court’s ‘policy’ barrier to the liability of local entities.”); Susanah M. Mead, 42 U.S.C. § 1983 *Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 566-67 (1987) (arguing that § 1983 was meant to impose respondeat superior liability).

147. Clearly Congress could both amend § 1983 as well as waive federal sovereign immunity. The Supreme Court has held, for instance, that Congress could pass a new statute holding state officers liable under § 1983 in federal or state court. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Further, Congress has waived federal sovereign immunity under limited circumstances. See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1994). Professor Bandes has argued that the courts also have the authority to provide an effective remedy against both federal and state governments, especially if Congress fails to do so. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 336-61 (1995).

148. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986).

149. See *Harris*, 489 U.S. at 392.

The choice between the negligence and strict liability standards is more difficult. The department will undoubtedly experience more unfavorable verdicts under a respondeat superior standard than under a negligence test. But, given the uncertainty as to what constitutes a "reasonable" amount of training or supervision, it may experience just as many suits under a negligence regime, and that may be the determinative factor for risk-averse organizations. Furthermore, behavioral theory suggests that punishment is not as effective when there is no legitimate alternative to the punished behavior,¹⁵⁰ and legitimacy-compliance theory likewise counsels against disproportionate penalties.¹⁵¹ Strict vicarious liability would impose liability on departments completely blameless in terms of training and supervision.

The relevance of the behavioral and legitimacy-compliance theories to "institutional" behavior is tenuous, however. Furthermore, the difficulty of proving (as opposed to alleging) negligence as to training or supervision may be almost as formidable as proving a policy or custom under *Monell*.¹⁵² Many other, largely imponderable, aspects of police, agency, litigant, and judicial temperament may affect whether the deterrent effect of a strict liability regime would differ significantly from one requiring negligence.¹⁵³ Ultimately, considerations other than deterrence may determine which standard is best.¹⁵⁴

150. See WILLIAMS, *supra* note 32, at 155 ("An alternative response should be available for the subject to perform. The suppression of the punished response will be greatest under conditions where the alternative response is never punished but instead produces greater reinforcement than the punished response.").

151. See *supra* text accompanying notes 66-71.

152. Cf. Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591, 591 & n.1 (1983) (noting that, through 1982, once suits "dominated by elements of fraud or self-dealing" were eliminated, there were only seven successful shareholder cases for negligent management, making them "rare to the point of becoming an endangered species").

153. See generally Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 664-71 (1998) (discussing effects of inadvertent or irrational actions of employees or supervisors, entity miscalculations of risk, liability insurance, judicial overenforcement and underenforcement of a negligence standard, and miscellaneous factors such as fear that risk of liability will injure the entity). Geistfeld ultimately concludes that a negligence standard is just as efficient as a strict liability standard as a means of deterring dangerous activities, if those activities are common in the community, of largely public (as opposed to private) benefit, and cannot be relocated (all factors which would seem to apply to searches and seizures). See *id.* at 654.

154. Kramer and Sykes address some of these other issues. They note that a "negligence-based approach to vicarious liability might be more effective than strict vicarious liability at motivating cost-effective monitoring, training, and similar measures: negligence cases would generate a body of information about required precautionary measures for the guidance of other municipalities." Kramer & Sykes, *supra* note 135, at 285. But they also point out that "the negligence approach places the court in the position of second-guessing municipal officials about what measures should be taken to guard against constitutional torts, a process that may introduce significant error costs." *Id.* Furthermore,

[s]trict vicarious liability automatically redistributes the risk of loss from typically inefficient risk-bearers (victims and municipal employees) to a typically superior risk bearer that can distribute the risk broadly among the taxpaying public. Under the negligence approach, by contrast, losses are redistributed only when the municipality is shown to have been negligent.

Although the appropriate vicarious liability standard is not entirely clear, the *substantive* liability standard must be based on strict liability if deterrence is the goal. In other words, departments should be liable for their officer's inadvertent violations of the Fourth Amendment as well as for negligent ones. Adoption of this substantive standard is crucial for at least two reasons. First, given the amorphousness of many Fourth Amendment standards such as probable cause and exigency, a negligence standard would leave far too many illegal searches and seizures unremedied, thereby creating little incentive on the part of the department to improve its hiring, training, and supervision. Because we are seeking to extinguish violations of a fundamental constitutional provision,¹⁵⁵ the maximum amount of deterrence is warranted.¹⁵⁶ Second, a negligence standard might well truncate development of Fourth Amendment doctrine. As the Supreme Court has demonstrated in its application of the good-faith exception to the exclusionary rule,¹⁵⁷ courts are quite capable of pronouncing an officer's actions reasonable without bothering to clarify the relevant constitutional standard.¹⁵⁸

Further implications of these suggested changes are explored later in this article.¹⁵⁹ The important point for now is that subjecting police departments to liability for constitutional violations perpetrated by their officers would create a far greater incentive to improve hiring,

Id. at 285-86. Kramer and Sykes also discuss the transaction costs of the two vicarious liability regimes and conclude that the "choice is a close one." *Id.* at 292-93. Other authors have stressed the compensatory advantages of the respondeat superior approach. *See, e.g.,* Lewis & Blumoff, *supra* note 146, at 829-38.

155. As Justice Harlan noted in *Bivens*, "injuries inflicted by officials acting under color of law . . . are substantially different in kind [from those inflicted by private parties]." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).

156. While the Court has insisted on a narrow vicarious liability standard in § 1983 actions, it has been willing to adopt a strict substantive liability standard, in large part for the reasons given in the text. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court stated:

The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Id. at 651-52. However, the courts have not adopted the same strict substantive liability approach in suits against the federal government. *See Laird v. Nelms*, 406 U.S. 797, 802-03 (1972) (holding federal government liable under Federal Tort Claims Act [FTCA] only for "negligent or wrongful" acts); *United States v. Muniz*, 374 U.S. 150, 153 (1963) (liability under FTCA only exists for actions that would be torts under the relevant state law); *Norton v. United States*, 581 F.2d 390, 397 (4th Cir. 1978) (holding government not liable under the FTCA for misconduct committed in good faith).

157. In *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), for instance, the Court resolved the case through application of the good-faith exception without addressing the probable cause issue in *Leon* or the particularity issue in *Sheppard*.

158. *See Seigert v. Gilley*, 500 U.S. 226, 231-35 (1991).

159. *See infra* text accompanying note 222.

training, and supervision than the exclusionary rule does. This is so not just because of the fiscal impact such a rule would have on the department, but because of its potential impact on the public. When a criminal goes free because of excluded evidence, the courts are usually blamed.¹⁶⁰ When the citizenry discovers that police malfeasance means distributing tax dollars to search and seizure victims (criminal as well as innocent), it is more likely to finger the police department.¹⁶¹ In addition to the loss of money is the loss of popular good will, which might be the ultimate motivating force for the department.

C. *Impact on the Courts: Development of the Law*

Any system that purports to implement constitutional dictates must afford adequate occasion for developing the nuances of the law. In this country, those nuances have come from the process of judicial review. The exclusionary rule clearly facilitates appellate perusal of Fourth Amendment claims because it provides a strong incentive to bring a claim (dismissal of criminal charges), and the claim can be brought within a setting that is tailor-made for resolving such issues—judge-run suppression hearings at which criminal defense attorneys familiar with the case refine the issues. The traditional damages action, on the other hand, fails miserably in this regard, partly for the lack-of-litigation reasons already noted and partly because, even if litigation were more routine, juries are particularly ill-equipped to devise black-letter rules that provide police the guidance they need.¹⁶²

Once again, however, the proposed changes, in particular the provision for a bench trial initiated by state-paid litigators (who might well be hired from the defense bar), offer assurance that Fourth Amendment claims will be raised and vigorously litigated. Providing for appeal of the damages action to the appropriate appellate court would assure continued judicial review. Indeed, such a damages action is likely to *increase* opportunities for judicial development of the Fourth Amendment, in three ways that liberals, in particular, are likely to appreciate.

160. See Barnett, *supra* note 3, at 949-50 ("Given judicial discretion in findings of fact and law, the judge who excludes evidence is perceived to be the person most directly responsible for sustaining a constitutional challenge. Because of this, the judge and not the police will most often be blamed by both the public and the prosecutor for scuttling the prosecution."); cf. OFFICE OF LEGAL POLICY, *supra* note 82, at 611 n.99 (reporting poll showing that the percentage of respondents who believed that the "courts are 'too easy' on criminals jumped from 52% in 1967 to 83% in 1981").

161. See Patton, *supra* note 79, at 800-02 (noting, based on interviews with police and government officials and newspaper accounts, that one of the few ways § 1983 suits occasionally do have an impact on the police department is when the lawsuits "bring political attention to the issue . . . because of the high cost to taxpayers").

162. Perhaps judicial instructions plus some sort of special verdict system would help clarify jury thinking, but a judge is much better equipped to explain decisions, in writing if need be.

First, because it encourages litigation of illegal actions by innocent individuals and those who are not prosecuted, it will multiply the types of issues raised in court. For instance, stops and frisks, which often devolve into pure harassment, racial and otherwise,¹⁶³ would be subject to far more judicial oversight than occurs under the exclusionary regime.¹⁶⁴ Other relatively low-profile types of police actions would likewise receive more oversight. Mertens and Wasserstrom assert that, because of the “nominal” injury involved, the 1979 ruling in *Delaware v. Prouse*¹⁶⁵ prohibiting random traffic stops would have been “improbable” without the exclusionary rule.¹⁶⁶ Yet, had a damages regime of the type proposed here existed in 1961 (when *Mapp* was decided), far fewer than eighteen years would have elapsed before a *Prouse*-type case would have been adjudicated, because any driver who was randomly stopped, not just one with drugs in the car, could have brought such a case. Because the exclusionary rule depends upon the fortuity of finding evidence of crime (and on the further fortuity of prosecution), it forecloses or delays litigation of many such issues.

The second reason an effective damages remedy is better able than the exclusionary rule to flesh out Fourth Amendment doctrine is the rule’s poor remedial “fit” with many types of cases, which has led to judicial reticence about refining certain aspects of the law. If there is any logic to exclusion as a remedy other than its supposed deterrent effect, it is that the government should not get to use evidence it never would have found had it abided by the Constitution.¹⁶⁷ To many judges, excluding evidence found in violation of the probable cause requirement may make sense under this rationale, on the theory that lack of probable cause means the government would not have discovered the evidence had it acted constitutionally. But this characterization is hard to apply to exclusion of evidence in other situations in which the Fourth Amendment is relevant, such as when a search is

163. See *supra* note 34; *infra* note 214; see also Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 253 (1991) (“Black men know they are liable to be stopped at anytime [sic], and that when they question the authority of the police, the response from the cops is often swift and violent.”).

164. As the Supreme Court recognized in *Terry v. Ohio*, “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.” 392 U.S. 1, 14-15 (1968); see also David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 32-36 (1994) (noting the ineffectiveness of the rule as a device for regulating low-level police activity).

165. 440 U.S. 648 (1979).

166. See Mertens & Wasserstrom, *supra* note 2, at 404-07.

167. For further development of this contention, and an argument that it too is ultimately flawed, see *infra* text accompanying notes 295-306.

unnecessarily conducted late at night,¹⁶⁸ a postsearch inventory is improper,¹⁶⁹ or an arrest involves excessive force.¹⁷⁰ Because probable cause, by hypothesis, exists in these situations, the government did not need to violate the Constitution to get the evidence at the time it did; the "punishment" of exclusion does not seem to fit the "crime."

Thus, it is not surprising that judicial pronouncements about the latter aspects of searches and seizures are less developed.¹⁷¹ William Stuntz's complaint that the courts have done a poor job regulating the use of investigative coercion may, in large part, be a result of the exclusionary remedy's dominance.¹⁷² A system in which compensatory and liquidated damages were the preeminent remedy, on the other hand, could easily countenance any type of Fourth Amendment claim, including police use of excessive force.

The final reason a damages remedy is preferable to the exclusionary regime in its impact on judicial decisionmaking is that it would encourage fuller development of *all* Fourth Amendment jurisprudence. This is not the argument, made by some opponents of the exclusionary rule,¹⁷³ that decisionmakers are more likely to give the Fourth Amendment a fair reading when the specter of freeing a criminal is removed from the calculus. Judges in a damages regime will know that an expansive rule, if effectively implemented, will make the detection and apprehension of some criminals more difficult. They also will know that such a rule will allow liability to be more easily imposed both on individual officers and on police institutions, and

168. See *Gooding v. United States*, 416 U.S. 430 (1974) (deciding whether a nighttime search made without a special showing violated statutory rights, without considering Fourth Amendment issues).

169. See *Cady v. Dombrowski*, 413 U.S. 433, 448-50 (1973) (suggesting that an inventory is not required by the Fourth Amendment).

170. See *generally* *Tennessee v. Garner*, 471 U.S. 1 (1985) (leaving unclear whether evidence obtained through the misuse of deadly force must be excluded).

171. See *supra* notes 168-70; *cf. Wilson v. Arkansas*, 514 U.S. 927, 937 & n.4 (1995). In that case, the Court declined to address the argument that "any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation." *Id.*

172. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1068, 1077 (1995) (labelling "backward" that "we have a large and detailed body of law to tell police when they may open paper bags or the trunks of cars" and very little law on "the level of force that may be used in making an arrest or conducting a search"). Stuntz cites *Anderson v. Creighton*, 483 U.S. 635 (1987), as an example of his point. In *Anderson*, the police allegedly viciously assaulted Creighton (who was not a suspect), cursed at his three daughters, and badly injured one of them. Stuntz criticizes the trial and appellate courts for focusing solely on whether there was probable cause for the entry and wonders why they failed to find damages liability under the Fourth Amendment. The answer may be simple: the courts were worried that a contrary result would lead to exclusion of evidence in such situations. *Cf. People v. Hanna*, 567 N.W.2d 12, 15 (Mich. Ct. App. 1997) (upholding application and threat of further application of "Do-Rite sticks," which cause an intense temporary pain, to subdue a person who refused to allow blood test).

173. See *Amar, supra* note 3, at 799 ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."); *Barnett, supra* note 3, at 959-66 (discussing incentives for judges not to exclude evidence).

that in many such cases the executive branch will have to pay money to criminals. Many judges may find these possibilities just as unpalatable as the dismissal of meritorious cases. As noted earlier, removing the threat of exclusion should make judges who hear Fourth Amendment claims more willing to discredit factual assertions made by the police. But, in the abstract, a damages regime will probably not make them more willing to orient the law in a more liberal direction.

What *will* have a liberalizing effect on judges, however, is the avalanche of claims from noncriminals that an effective damages remedy should bring.¹⁷⁴ To understand this point, further explication of the decisional dynamics at work in typical Fourth Amendment litigation is necessary. The predicate for these dynamics is that, under the exclusionary regime, the Fourth Amendment is virtually always associated with a criminal; only people who have been found in possession of evidence of a crime seek exclusion. In this setting, social science tells us that two heuristics will often operate¹⁷⁵ in a way that will always result in decisionmaking irrationally biased toward the government.

The first heuristic is “representativeness”—the common human tendency to reason by anecdote and stereotype rather than through the use of group-based knowledge.¹⁷⁶ Just as the image of the welfare queen has come to permeate popular perceptions of our entitlement

174. The number of claims that might be brought by “innocent” people is difficult to estimate, but a very conservative guess is that one out of ten claims would fit that categorization. According to a seven-jurisdiction study of the warrant process by the National Center for State Courts, warrant-based searches “turned up something worth seizing” in less than 90% of their searches in two jurisdictions, in “at least” 90% of their searches in three of the jurisdictions, and in “nearly” 100% of their searches in the remaining two. VAN DUIZEND ET AL., *supra* note 48, at 40. However, these figures are based on “cases for which returns were filed.” *Id.* It would not be surprising to learn that police do not file returns when they find nothing. *Cf. id.* at 36 (“[A] sizeable percentage of returns [in three cities] were not in the files.”). Furthermore, what the officers do find is often different from what is listed in the warrant. *See id.* at 38, 40 tbl.21 (stating that evidence seized was listed in the warrant between 75% and 93% of the time). As one commentator noted about the NCSC study, “[t]he fact that material was seized has no bearing whatever on the existence of probable cause. As one policeman [in the study] put it, they usually seize ‘something,’ if only to ‘protect the ‘reliability’ of an informant.” Duke, *supra* note 63, at 1411.

The error rate for warrantless searches is likely to be much higher than that reported in the NCSC study, given that warrants must be obtained from a magistrate and are usually preceded by more investigation than occurs with a warrantless search. Indeed, there is some evidence that the error rate is quite a bit higher. One survey reported that 22% of black and 6% of white interviewees randomly sampled from 15 cities reported being frisked or searched without—in their opinion—good reason. *See* Wayne A. Kerstetter, *Who Disciplines the Police? Who Should?*, reprinted in GELLER, *supra* note 82, at 157 (citing ANGUS CAMPBELL & HOWARD SCHUMANN, *RACIAL ATTITUDES IN FIFTEEN AMERICAN CITIES* (1969)); *see also* LAWRENCE W. SHERMAN ET AL., NATIONAL INST. OF JUSTICE, *THE KANSAS CITY GUN EXPERIMENT 6* (1995) (relating a campaign to seize guns in one area of Kansas City, in which police seized only one gun in every 28 traffic stops; roughly one-fifth of the seized guns were legally carried).

175. The idea for this point comes from Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, OHIO ST. L.J. (forthcoming 1999) (manuscript at 49-57, on file with author).

176. For further description of this heuristic and its implications for decisionmaking, see Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124-27 (1974).

system despite data to the contrary, drug dealers and their like represent the typical searched person to the suppression hearing judge, despite the likelihood that many people who are searched have no association with drug dealing or any other crime. With that faulty picture in mind, it is difficult to maintain allegiance to high-minded constitutional values in making the decision between a defendant-oriented rule and a government-oriented one.

The second heuristic is “availability”—the tendency to make predictions about whether an event will occur based not on the actual frequency of the event but on one’s memory of how often it occurs.¹⁷⁷ In the Fourth Amendment context, this translates into a judicial penchant for affirming police pronouncements that sufficient suspicion of crime existed. In the official “judicial memory,” comprised solely of data from suppression hearings, everyone searched or stopped is guilty; thus, the heuristic tendency will be to assume that police are right when they say guilt was clear at the time of the search or seizure.

Of course, these heuristics do not completely dominate judicial thinking; suppression motions are granted, albeit rarely.¹⁷⁸ But the amorphous nature of probable cause, reasonable suspicion, and exigency determinations—the bread and butter of Fourth Amendment law—often allows subtle influences of this type to have dispositive effect. The perfect antidote to the representativeness and availability processes (in the sense that “anecdotal” is fought with anecdotal) is provided by a damages regime: experience with *innocent* people who have been illegally stopped by the police. Judges are more likely to acknowledge the true base rate of unconstitutional actions when they see before them multiple people who were arrested, stopped, or searched and found to have no evidence of crime in their pockets, cars, or homes; accordingly, they are more likely to evaluate accurately the overall societal impact of progovernment findings.

The ultimate effect of the proposed damages regime on the judiciary, then, should be less cynicism about the Fourth Amendment and a more critical attitude toward the police. Judges faced with claims from noncriminal plaintiffs will be more likely to internalize the purpose of the Fourth Amendment—the privacy and autonomy interests of the innocent as well as the guilty. They will also be less willing to assume,

177. See *id.* at 1127-28.

178. According to the NCSC study, see VAN DUIZEND ET AL., *supra* note 48, judges granted only 12% of suppression motions in warrant-based cases. See *id.* at 42. The percentage of successful motions in warrantless cases is roughly the same. See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 597 tbl.7 (14.6% of evidence suppression motions granted). Furthermore, according to the latter study, 80% of the successful suppression motions were in cases involving possession of small amounts of drugs or other minor crimes, see *infra* note 195, suggesting that when the stakes are high, judges shy away from suppression for the reasons suggested in the text.

contrary to the Supreme Court's current tendency,¹⁷⁹ that police can be trusted to protect constitutional values. In short, the harsh reality of crime which inevitably permeates even into the most august courtroom will be counterbalanced by the grim truth about the power police wield, not only over criminals but over people not very much different from the judges themselves.

A final, and more speculative, impact of an effective damages regime is that it may make Fourth Amendment law simpler. There is no doubt that the exclusionary rule creates a huge incentive to litigate even the most trivial Fourth Amendment issue and has thus contributed to the complication of search and seizure law.¹⁸⁰ While the proposed regime would also provide a significant incentive to raise many such issues, its state-paid attorneys are much less likely to overlitigate than defense attorneys and their clients enticed by the prospect of dismissal. More importantly, judges in a damages regime are more likely to be concerned that vague doctrine will exacerbate overdeterrence of police (a topic discussed in more detail below), which should influence courts in the direction of making their pronouncements more digestible for the average officer. That is not to say Fourth Amendment law would become more liberal or more conservative; rather, judges would simply strive harder to produce bright-line rules to the extent possible.¹⁸¹

D. *The Proposed Damages Regime: Overdeterrence and Underdeterrence*

Perhaps it would be useful to summarize the principal tenets of the proposed alternative to the exclusionary rule that have been advanced to this point. An administrative agency would be responsible for bringing and assessing Fourth Amendment claims. The claims would be heard by a judge in proceedings that are streamlined in much the way most administrative proceedings are. Plaintiffs who pre-

179. See, e.g., *Segura v. United States*, 468 U.S. 796, 809 (1984) (assuming that police will not illegally enter premises to secure evidence pending arrival of a warrant); *Nix v. Williams*, 467 U.S. 431, 445-46 (1984) (reasoning that police will not knowingly violate Constitution merely because they think sought-after evidence will be discovered in any event).

180. See Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395, 412 n.81 (1989) ("The defense attorney in a criminal case has every incentive to raise hair-splitting distinctions and rather trivial search and seizure issues, for exclusion of crucial evidence is the reward for success regardless of the scope of the wrong. Many of the issues litigated in criminal cases would not be pursued in civil litigation, and we would be better off for this."); Heffernan & Lovely, *supra* note 6, at 357 ("By providing defendants with a strong inducement to litigate the legality by which evidence against them was obtained, the exclusionary rule has led to a vast increase in the complexity of the rules of search and seizure and has thereby contributed to officers' difficulty in determining what the law permits.").

181. Currently the courts waver in their eagerness to produce such rules. See generally Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 320-33 (1982).

vail would receive liquidated damages amounting to a percentage of the typical field officer's salary (say, somewhere between one percent and five percent). The individual officer would be personally liable for the damages unless he or she acted in good faith, in which case the police department would be financially responsible. Variants of the damages remedy, such as class actions and injunctions, would also be available through the court. Appeals could be taken to the normal appellate court.

The thesis of the foregoing discussion has been that this damages regime, or one substantially similar to it, would provide greater specific, general, systemic, and judicial deterrence than the exclusionary rule. Indeed, several writers have suggested that a damages remedy is a poor substitute for the exclusionary rule not because it is an inferior deterrent but because it might tempt government agents to *refrain* from doing their job.¹⁸² Police, worried about personal liability, might significantly limit their investigative work; agencies, concerned about their budget, might stop funding certain law enforcement practices; courts, deluged with claims from innocent people, might put too many restrictions on the police. The fight against crime, never easy, could be stultified.

Conversely, there is the possibility that in some high-profile or idiosyncratic cases individual officers and police departments might be willing to pay the price of violating the Fourth Amendment. They may calculate, in effect, that a conviction or arrest is worth the financial loss that will come from a damages suit. In at least one circumstance—the warrant issuance process—judges also may be left inadequately cabined by a damages regime. The proposal's potential for overdeterrence of individual officers and police departments and for underdeterrence of officers, departments, and courts leads to some suggestions for fine-tuning the system.

1. *Overdeterrence of Individual Officers*

The possible ill effects of personal liability have been described by Richard Posner:

Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance. At the same time, if their zeal leads them occasionally to violate a person's constitutional rights, then the tort remedy will impose on these officers the full social costs of their error. There is thus an imbalance: zealous police officers bear the full social costs of their mistakes through the tort system but do not

182. See Loewenthal, *supra* note 15, at 31-32; Mertens & Wasserstrom, *supra* note 2, at 408-09.

receive the full social benefits of their successes through the compensation system.¹⁸³

Based on this assumption, Posner proposed that individual officers be absolutely immunized, with the department bearing full liability under a respondeat superior theory.¹⁸⁴ Peter Schuck, whose 1982 book on suing the government is still the leading authority on the issue, reaches the same conclusion out of fear that imposing liability on individual government agents will chill “vigorous” decisionmaking.¹⁸⁵

These concerns are exaggerated in search and seizure cases, however, even assuming that indemnification is not a routine practice. Posner and Schuck are obviously correct that tort liability creates different contingencies for government officials than for private professionals. Whereas lawyers and doctors have a financial incentive to generate clients and patients despite the threat of malpractice claims, police, given their payment on a salaried basis, do not have an analogous incentive to generate arrests in the face of tort exposure. Because police will be paid in any event, the reasoning goes, they are more likely to choose the do-nothing option. But whatever may be the case for other government officials, there are many currencies besides money for police involved in investigation.

The first is the enormous pressure to fight crime. Perhaps the public’s general desire for disciplined school children, caring mental hospitals, and aggressive child protection, to use some of Schuck’s favorite examples,¹⁸⁶ is not sufficient to overcome an official’s fear of liability for being a strict schoolmaster, a pioneer of mental health treatment, or an antiabuse crusader. The government’s duty to prevent crime is of a different specie, however. No other function outside of regulation of the economy is perceived to be as important an indicator of good government; “law and order” has been one of the most politically potent domestic issues in modern times.¹⁸⁷ Responding to the resulting pressure, police organizations have developed arrest quotas (which dominate the officer’s world in at least some depart-

183. Posner, *Excessive Sanctions*, *supra* note 22, at 640.

184. See *id.* at 641 (“[The] rule would essentially be one of respondeat superior without the employer’s usual right to indemnification: the agency would be fully liable though its employees would not.”).

185. See SCHUCK, *supra* note 104, at 98 (“[T]he damage remedy against individual officials chills vigorous decisionmaking, and none of the incremental compensating adjustments of that remedy—contract, free legal defense, indemnification, insurance, or ‘good faith’ immunity—can restore that vigor entirely.”).

186. See, e.g., *id.* at 70, 72, 75, 95.

187. According to the Gallup poll, in recent times either “crime/violence” or “drugs” has consistently been rated first or second in response to the question: “What do you think is the most important problem facing this country today?” with “unemployment/jobs” being the only competitor. See The Gallop Organization, *Most Important Problem* (visited Jan. 13, 1999) <http://www.gallup.com/Gallup_Poll_Data/mood/problem.htm>; see also Roper Reports, *Crime Fears*, AM. DEMOGRAPHICS, July 8, 1997, at 35 (“Crime is the number-one problem most often cited by people of virtually all ages and household incomes.”).

ments),¹⁸⁸ promotion schemes based on investigative success, and even some financial rewards;¹⁸⁹ few other public agencies have analogous motivation systems.¹⁹⁰ In other words, because of the overwhelming public interest in crime control, there are a number of concrete incentives that counteract the individual police officer's potential concern about personal liability.

There is also professional pride. More so than most government officials, police and detectives define themselves as craftsmen—with their craft being the apprehension of criminals.¹⁹¹ It would violate norms prevalent throughout the police world to demonstrate a fear of, or lack of interest in, practicing that craft.¹⁹² Indeed, at the same time a damages regime is unpleasant as a source of personal sanction, its association with other professions, such as law and medicine, would reinforce the image of “professionalism” so long sought by the police.¹⁹³

188. Even if only half true of other departments, Rubinstein's account of Philadelphia police makes the point. See RUBINSTEIN, *supra* note 15, at 50 (“Arrest quotas are rigidly enforced for vice arrests Regardless of their success in fulfilling other departmental goals, any failure to produce the necessary vice arrests means trouble for the captain, the lieutenants, the sergeants, and all the men in the district who have assignments they want to keep.” (emphasis added)); see also *id.* at 47 (“Whenever there is an increase in the weekly totals of crimes reported, the men are urged, but not ordered, to be more ‘aggressive’ on patrol and to ‘increase the number and quality of vehicle and pedestrian stops’ they make.”); *id.* at 46 (“The production of . . . activity is so important to the district that the supervisors are willing to violate departmental regulations to assure it.” (emphasis added)); see also QUICK, *supra* note 109, at 30-31 (“In law enforcement, the so-called ‘clearance rate’ is one of the primary methods of evaluating both the personnel and the department. For example, an individual's performance may be evaluated on the percentage of crimes known to the police which the police believe have been ‘solved.’”); *supra* note 47.

189. See QUICK, *supra* note 109, at 50-52 (describing various reward programs developed by police departments).

190. See SCHUCK, *supra* note 104, at 77-79 (describing lack of “countervailing incentive systems” within government agencies). Jeffries elaborates on this phenomenon:

For government workers, the risk of job loss is overwhelmingly linked to bad performance, to the provable act of misconduct or neglect that will justify a civil service termination. . . . [T]o the extent that this characteristic of the civil service is recognized by prospective employees, there may be psychological self-selection. Persons willing to take risks in pursuit of gains may gravitate toward private industry [while those] who place a premium on job security may be . . . drawn to government work.

Jeffries, *supra* note 105, at 76. Police do not fit this description. See *infra* note 192.

191. See SKOLNICK, *supra* note 15, at 196 (“[T]he policeman tends to emphasize his own expertness and specialized abilities to make judgments about the measures to be applied to apprehend ‘criminals’. . . . He sees himself as a craftsman, at his best, a master of his trade.”); see also *id.* at 231 (speaking of “the policeman's stake in maintaining his position of authority, especially his interest in bolstering accepted patterns of enforcement”).

192. See BOUZA, *supra* note 55, at 71 (“Cops are physically brave and live with the absolute certainty that this is the prime value of their existence. Coward is such a powerful epithet that, even in a profession accustomed to the rawest language, it is a word that is used very sparingly.”); RUBINSTEIN, *supra* note 15, at 268 (“[W]hatever style he uses, [the police officer] is motivated by his need to keep whole his notion of himself as an effective and capable worker.”); *id.* at 336 (“He will do whatever he must to maintain his place on the street; whatever is essential to preserve the police as an institution.”).

193. The reinforcement may be more than symbolic. Mark Moore argues that the professionalization of the police has been hindered by two factors. See Mark Harrison Moore, *Problem-Solving and Community Policing*, in MODERN POLICING 99, 116-20 (Michael Tonry & Norval Morris eds., 1992). The first factor “is the continuing inability of [the police] to establish

Finally, there is the personal factor. Schuck speaks of the “asymmetry” in incentives caused by the fact that “[i]dentifiable victims of affirmative official wrongdoing are far more likely to seek and obtain remedies for their harms . . . than the invisible victims of official self-protection, who suffer in silence, unaware that they have been injured or ignorant that their injury is the consequence of some official’s self-regard.”¹⁹⁴ That asymmetrical incentive structure is significantly diluted where the police are concerned, given the reactive nature of much of police work. Those who have been injured by crime may not have a claim in tort against lackadaisical investigators, but they certainly are not invisible. Just as lawyers and doctors normally do not allow liability concerns to constrain them in helping people who come to them in need, police committed to crime control are unlikely to neglect a hapless victim’s case solely because of a threat of damages.

It is true that, when the crime is victimless, as involved in a drug transaction, for instance, police will not experience the same face-to-face pressure to solve the crime. Here, however, there are at least two reasons for thinking that the “asymmetric threat” to law enforcement that a damages action might pose is not altogether a bad thing. First, the lion’s share of constitutional abuse occurs in connection with drug investigations.¹⁹⁵ Second, low-level drug investigations are probably a waste of resources and may even foster crime.¹⁹⁶ To one who agrees with this point of view, a regime that strongly deters questionable searches for drugs would accomplish a desirable result, without causing the political uproar decriminalization would bring.¹⁹⁷

In addition to a different incentive structure, police work differs from other private and public contexts in one other significant way—the existence of the warrant process. While some public officials might

appropriate mechanisms of accountability linking them to the overall structure of city government and to the citizens.” *Id.* at 116. The lack of such mechanisms has “cut off [the police] from the aspirations, desires, and concerns of citizens,” Moore states. *Id.* at 117. “The second major impediment to legitimacy and enhanced professional standing for policing was that the police never seemed fully to embrace the constitutional values that were the only sure path for accomplishing these goals.” *Id.* at 118. Both of these problems could be substantially mitigated by an effective damages regime.

194. SCHUCK, *supra* note 104, at 80.

195. *Cf.* Nardulli, *supra* note 178, at 602 (reporting that over 80% of cases dismissed due to exclusion involve either possession of small amounts of marijuana or cocaine, obscenity, or petty larceny).

196. One commentator has argued that “searches and convictions can accomplish very little in dealing with this essentially victimless activity and may even be counterproductive by decreasing supply, raising prices and thereby pressuring addicts to commit victim crimes in order to pay for their habits.” Loewenthal, *supra* note 15, at 38.

197. The same type of argument can be made about the undoubted fact that the threat of individual liability will occasionally be enough to nudge even the most aggressive officer into passivity when a “victimless” situation might involve danger. For instance, the officer who spots a suspicious-looking individual might opt for inaction if the possibility of a damages action is added to the danger posed by a seizure or subsequent frisk. Presumably stops based on hunches are precisely what we want to deter. *See* CAMPBELL & SCHUMANN, *supra* note 174, at 157 (recounting numerous reports of frisks of allegedly innocent people).

be able to “self-immunize” through obtaining authorization from their superiors,¹⁹⁸ only police officers have the ability to obtain what is in effect an advisory opinion from a judge. Liberals have often bemoaned the fact that police so rarely seek *ex ante* review, even with the advent of telephonic warrants, which vastly facilitate the process.¹⁹⁹ An effective damages remedy would provide a strong incentive to seek this unique form of self-immunization, an incentive the exclusionary rule apparently does not provide.²⁰⁰ Officers who are at all anxious about a prospective search and seizure can weigh the cost of seeking a warrant against the insecurity of not having one and act accordingly.²⁰¹

In short, individual liability is not per se antithetical to good police work. Moreover, there are independent reasons for thinking that relying solely on entity liability in this context, as Posner and Schuck do, is misguided. As this article has already explained, without direct punishment of miscreant officers, individual deterrence is minimal. A system consisting solely of entity liability either entirely removes that punishment, rendering it useless as a deterrent, or reintroduces it in the form of internal sanctions, in which case the “chilling” problem (to the extent one exists) merely resurfaces in another guise.²⁰² In contrast, a process that imposes direct liability on those officers who act in bad faith not only implements potent specific deterrence, but also provides a clear judicial pronouncement of egregiousness that separates out the truly bad actors from the bumbling ones, and thus identifies for the department those whose behavior most needs chilling.²⁰³ That

198. An interesting question in this regard is whether there should be a “Nuremberg defense” when police receive orders from their superiors. At one time, it was apparently the “policy” of the New York City Police Department to conduct warrantless home arrests in violation of *Payton v. New York*, 445 U.S. 573 (1980), in the hopes of avoiding New York’s rule, based on the state constitution, requiring counsel at interrogation of any person arrested on a warrant. See *Harris v. New York*, 495 U.S. 14, 20-21 (1990). Clearly the department should be liable in this situation. Assuming that the officer was aware that the policy violated *Payton* and was an end run around New York’s rule, the officer should also be liable, in the same way an officer is liable when he or she has reason to know a warrant-based search is invalid. See *infra* note 201. Individual liability would also provide an incentive to break the code of silence.

199. See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512-13 (1991) (calling for a vastly expanded warrant requirement in light of technological advances such as the telephonic warrant).

200. See VAN DUIZEND ET AL., *supra* note 48, at 17 (“[T]he overwhelming majority of criminal investigations are conducted without a warrant.”); see also SHELDON KRANTZ ET AL., *POLICE POLICYMAKING: THE BOSTON EXPERIENCE* 102-03 (1979) (reporting an average of under 700 search warrants issued in Boston annually between 1961 and 1976).

201. Of course, if the officer lies to the magistrate, there is no immunity. See *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (“[Liability exists if] a reasonably well-trained officer [in the officer’s position] would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.”).

202. Cf. *Kramer & Sykes*, *supra* note 135, at 300 (“[I]nefficient self-protective behavior is by no means unique to a regime of personal liability . . .”).

203. Every major department has rogue officers or officers who are very likely to scoff at due process concerns. For instance, the New York Police Department’s Knapp Commission distinguishing between “meat eaters” and “grass eaters,” with the meat eaters, although comprising

pronouncement is essential, given a police culture that tends to close ranks around those who are punished by outsiders.²⁰⁴

All of this is not meant to deny that individual liability can have a deleterious effect on the law enforcement efficacy of field officers if it is too broad in scope. Officers should only be deprived of immunity in search and seizure cases if they knowingly or recklessly violate a person's Fourth Amendment rights (i.e., they are at least aware of a substantial risk of unconstitutionality).²⁰⁵ Negligent violation should not be grounds for individual liability.²⁰⁶ Only subjective mental states are likely to correlate with the ability to deter in those situations, like the typical warrantless action, that do not allow for long-term deliberation. Furthermore, as noted earlier, limiting liability to knowing and reckless violations resonates with legitimacy-compliance theory's admonition that willingness to comply with the Fourth Amendment will be undercut by decisions perceived as unfair.²⁰⁷

only about 2% of the force, setting the prevailing atmosphere. See BOUZA, *supra* note 55, at 72. The meat eaters can "be sadistic leaders who set a tone that virtually coerces the timid majority into going along with them." *Id.* Yet, without some outside pressure to do otherwise, police departments have a significant incentive to keep these individuals, because they do the "dirty work." See *id.* at 71; see also SKOLNICK & BAYLEY, *supra* note 55, at 52 (distinguishing between "street-wise" cops, who are "apt to approve of cutting corners, of throwing weight around on the street, [and] of expressing the qualities of in-group solidarity," and "management cops" who "tend to be more legalistic, rule oriented [and] rational"). If the illegal actions of these more aggressive police are to be curbed, particularly stiff punishment is needed. The suggestion here is that, at the least, there should be personal liability in addition to a judicial holding designed to embarrass the department into doing something about the officer. Later it is suggested that the department should be held presumptively liable in such situations unless it shows it has taken or will take significant action against knowing violators. See *infra* text accompanying notes 225-26.

204. See Kerstetter, *supra* note 174, at 164 (discussing the tendency of police supervisors left out of the sanctioning process (by civilian review boards) to "align [] with their nominal subordinates in a conspiracy to resist the resented 'others'").

205. This language is borrowed from the Model Penal Code's definition of recklessness. See MODEL PENAL CODE § 2.02(2)(c) (1994).

206. However, violation of a rule that is clearly established ought to create a presumption of recklessness; a claim of ignorance of such a rule is suspect. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (allowing no immunity for violation of a clearly established rule of which the officer was unaware). If this were the test, the officers in the Akers and Lanza-Kaduce study who stated that they conducted searches they knew to be illegal or highly questionable would be liable. See *supra* text accompanying notes 112-16. The officers in the Perrin et al. and Heffernan and Lovely studies, see *supra* note 130, who appeared to be ignorant of the Fourth Amendment law would presumptively be liable (to the extent the questions they missed were based on well-established Supreme Court law), but that presumption could be overcome if they can show that they were truly unaware of the rule (e.g., because it was not covered in training) or believed the rule was otherwise (e.g., because of bad training or comments from colleagues or superiors). Although these outcomes are similar to those that would pertain under *Harlow*, note one difference: the officer whose conduct is objectively "reasonable" but who is aware that it is nonetheless unconstitutional would not be immune from suit. See Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 619-20 (1989).

207. Basing individual liability on proof of at least recklessness also makes sense from the two other commonly accepted bases of tort liability (besides deterrence): corrective justice and distributive justice. Only one who is aware of the risk of wrongdoing deserves punishment. See Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 668-69 (1998) (arguing for individual liability only in cases where the official is on notice of the act's unconstitutionality, because "individual damages liability for constitutional violations serves a role that is analogous to the moral blaming function of criminal law"). And for those violations

Two other procedural steps should be taken to ensure against overdeterrence. Because the threat of litigation can inhibit even the most upright officer, government entities should indemnify their police employees for the cost of defending the damages action.²⁰⁸ Furthermore, to avoid actual and feared conflicts of interest between the individual (who will argue good faith) and the government (which may argue otherwise), the individual should be allowed to use a private attorney, rather than a government-supplied one.²⁰⁹ Also relevant here are two other aspects of the proposal: actions will be screened by an administrative agency, which should keep frivolous or vexatious claims to a minimum, and procedure will be streamlined (most importantly, through reliance on judges rather than juries), thus minimizing overdeterrence caused by fear of prolonged litigation.

2. *Overdeterrence of Police Departments*

William Stuntz has put most succinctly the assertion that a damages regime that imposes significant liability on governmental entities will have a major negative impact on law enforcement.

Most police work for local governments, and most local governments operate under serious budget constraints. . . . Because crime tends to be concentrated in poor neighborhoods, the people who get the biggest benefits from police work do not pay the biggest bills. . . . Just as a government faced with large damages liability for running a municipal pool, which serves poor residents but is paid for by rich ones, may simply close the pool, a government faced with large damages liability for the police may simply reduce the police presence in areas likeliest to give rise to lawsuits. This is overdeterrence writ large.²¹⁰

This is a plausible scenario. Unlike a private business, which may be able to pass the costs of increased liability on to consumers in the form of increased prices, a police department generally has little control over its pricing input (the government-determined budget) and thus may compensate for damage losses or try to avoid them by reducing production output (its commitment to law enforcement). Further, as Stuntz suggests, adjustments are most likely to affect the communities where searches and seizures most often occur.

of the Fourth Amendment that are not knowing or reckless, the employing entity—the government that must act constitutionally—is the most appropriate “loss-spreader” from the distributional perspective. See Lewis & Blumoff, *supra* note 146, at 828 (“[F]or the compensatory goal to be met, limitations on the liability of the agent, driven by concerns about fairness and untoward stifling of initiative, demand correlative enlargement of the liability of the entity.”).

208. The federal government and many state governments provide such representation. See SCHUCK, *supra* note 104, at 83-85.

209. Federal and state practice is variable in this regard. See *id.*

210. William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 446 (1997).

Stuntz's analysis relies on three questionable assumptions, however. The first is that concerns about damages will outweigh the department's perceived duty to the public. As already discussed, if the perception develops that the police are abandoning certain locales, the political process may well exert a countervailing pressure on municipal governments and their departments. Poorer communities are often as adept as rich ones at making that pressure felt.²¹¹ Moreover, uncontrolled crime from poor neighborhoods can spill over into better-off ones, and these communities will then themselves join the political warpath.

Further, contrary to Stuntz's apparent assumption, removal of the police from the hottest crime areas is not the only way—and, given the likely public outcry over such a move, probably not the way departments will choose—to reduce exposure to lawsuits over searches and seizures. Better training and supervision are two obvious responses. Another sensible response departments are likely to prefer over withdrawal is implementation of law enforcement modalities that do not rely as heavily on actions that implicate the Fourth Amendment. Many of these can be as effective as investigative searches and seizures.

Consider the following illustration. The classic “police presence” in lower class neighborhoods is aggressive patrol.²¹² Although long touted as an effective way of preventing and deterring street crime,²¹³ this strategy in fact verges on being nothing more than a random stop policy with racist overtones.²¹⁴ It thus relies on precisely the type of

211. Historically, poor black communities have often received inferior law enforcement, undoubtedly partly the result of their political powerlessness. See Gershon M. Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. C.R.-C.L. L. REV. 1, 8-10 (1968). But modern day inner city communities that feel their law enforcement needs have been ignored have organized to exert powerful influences on municipalities. See generally Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1163 (1998) (describing how African American community groups have mobilized to support community policing techniques, gang-loitering statutes, and antigang ordinances).

212. See generally James Q. Wilson & Barbara J. Boland, *The Effect of the Police on Crime*, 12 LAW & SOC'Y REV. 367 (1978).

213. See *id.*; SHERMAN ET AL., *supra* note 174, at 6-9 (use of traffic stops in Kansas); Lawrence W. Sherman, *Police and Crime Control*, in MODERN POLICING, *supra* note 193, at 157, 197 (reporting a study in San Diego using “field interrogations”); *id.* (reporting a study in Houston and Newark using antiloitering sweeps relying on an ordinance against obstructing pedestrian traffic); *id.* at 201-02 (250% increase in patrol presence in selected “hot spots”).

214. See *Terry v. Ohio*, 392 U.S. 1, 14 & n.11 (1968) (speaking of “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain” and the “[m]isuse of field interrogations as more departments adopt aggressive patrol” (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967))); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679-81 (1994) (finding that “every person who works or lives in a high crime area and who avoids the police is subject to automatic seizure, and to automatic search if the crime suspected involves drugs” and that because of the disproportionately high number of African Americans and Hispanic Americans living in those areas, “they are subject to this treatment much more often than are whites”); Adina Schwartz, *“Just Take Away Their Guns”: The Hidden Racism of Terry v. Ohio*, 23 FORD.

search and seizure that will be the subject of suit under the proposed regime; as suggested earlier, there is little doubt that an effective damages remedy (in clear contrast to the exclusionary rule)²¹⁵ will inhibit such tactics. To many who are concerned about the interaction of police and citizens in these communities, this outcome is an acceptable tradeoff for lessened police protection.²¹⁶ But the important point for the purpose of addressing Stuntz's concerns is that no such tradeoff is necessary; the end of aggressive patrolling does not have to mean the police will disappear from the neighborhood.

Rather than evacuating the area, police can engage in other types of proactive policing that do not require intrusive seizures and searches, such as those suggested by problem-oriented policing theory. This approach, which has become a prominent general crime prevention strategy in the past two decades,²¹⁷ is an attempt to move away from incident-driven police work toward efforts to identify global crime concerns and customize the police response to them. A study of how one police department used this approach to deal with three crime "problems"—burglaries in a housing project, thefts in shipyard parking lots, and prostitution and associated robberies on a particular street—is instructive:

[The] problem-solving efforts began essentially as directed patrol operations designed to identify patterns of offending or known offenders and to deploy police to catch the offenders. All gradually evolved into quite different efforts that involved activities other than arrest and agencies other than the police. The attack on burglaries in the housing project involved surveying tenants, cleaning the projects, creating a multiagency task force to deal with particular problems in the housing project, and organizing the tenants not only to undertake block watches but also to make demands on city agencies. The attack on thefts from cars eventually involved the inclusion of police officers in the design of new parking lots to make them less vulnerable to theft. The attack on prostitution and robbery involved enhanced code enforcement

HAM URB. L.J. 317, 365-73 (1996) (summarizing relevant studies). As Schwartz has cautioned, however, it is not yet clear whether the differential treatment of blacks and whites is largely the result of racism or whether instead it is primarily the greater involvement of blacks in crime.

215. See Wayne R. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond, in POLICE PRACTICES AND THE LAW: ESSAYS FROM *The Michigan Law Review* 135, 154-57 (F.A. Allen ed., 1982) (speaking of the "hard realities" that the exclusionary rule is ineffective against racist abuses of the stop and frisk power). Indeed, one study suggested that the advent of *Mapp* led to an increase in "preventive or aggressive patrols" as officers deliberately engaged in illegal searches and seizures in order to confiscate dangerous weapons or drugs (with no intention of prosecuting). See *Effect of Mapp v. Ohio*, *supra* note 6, at 99-101. The authors of the study, although friendly to *Mapp*, concluded that the benefit of *Mapp* was undermined by these techniques. See *id.* at 103.

216. See Harris, *supra* note 214, at 688; Maclin, *supra* note 163.

217. See generally COMMUNITY POLICING: RHETORIC OR REALITY? (Jack R. Greene & Stephen D. Mastroski eds., 1988); Herman Goldstein, *Improving Policy: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979).

against hotels and bars that provided the meeting places for prostitutes and their customers as well as decoy operations²¹⁸

These problem-solving tactics, which the study indicates were at least as successful as an aggressive patrol strategy would have been,²¹⁹ obviously eschewed traditional searches and seizures. Other problem-solving devices, such as finely tuned antiloitering and antigang statutes that avoid vagueness concerns,²²⁰ do trigger Fourth Amendment events, but in ways that involve so little discretion that suits are unlikely after the first test cases.²²¹ With options like these, police departments sensitive to political pressures should have little incentive to forsake the ghetto out of fear of liability from illegal searches and seizures. Unlike Stuntz's municipal pool, for which there may be no litigation-safe alternative, less invasive, equally effective law enforcement techniques will often exist that are preferable to giving up on ghettos altogether. If so, departmental liability for illegal searches and seizures can even accelerate the transition.

The third, most fundamental assumption underlying Stuntz's suggestion that a damages remedy might diminish law enforcement "writ large" is that a sizeable number of illegal searches and seizures and accompanying suits are inevitable; otherwise, of course, no compensating adjustments by the department would be necessary. If individual liability works as predicted, however, there may be a reduction in legal actions against departments as well. Whether a significant number of actionable illegalities against the department remain will depend, to some extent, on the applicable liability standards. The department will presumably experience more unfavorable verdicts under the strict vicarious and substantive liability standards than it would under a negligence standard, and even more adverse verdicts than under the current liability structure. But even if a strict liability rule produces an irreducible minimum of verdicts against police departments,²²² its overall effect will probably not outweigh the political exi-

218. Moore, *supra* note 193, at 130.

219. Compare *id.* (reporting that burglaries in the housing project dropped by about 35%, thefts from cars in the shipyards declined by more than 50%, and the number of prostitutes working the targeted street dropped from 28 to six, with the number of robberies committed in area declining by 43%), with SHERMAN ET AL., *supra* note 174, at 1-3 (reporting a 49% reduction in gun crime as a result of aggressive patrolling), and Sherman, *supra* note 213, at 213 (13% reduction in crime as a result of aggressive patrolling).

220. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 622-24 (1997).

221. In an article that makes similar points, but from a social organization perspective, Meares argues that tough enforcement of drug laws harms law-abiding members of low-income neighborhoods more than it helps them and that other law enforcement mechanisms relying on police-citizen "partnerships" such as "reverse stings" and antiloitering statutes should be used instead. See Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

222. Heffernan and Lovely estimate, based on their "testing" of over 400 police officers, that "given the inescapable complexity of the rules of search and seizure, there is an *uneliminable* 20% to 30% margin of error among even well-trained officers as to the legality of intrusions

gencies and professional pretensions that discourage police and police departments from deserting their posts.

3. *Underdeterrence of Police and Police Departments*

The foregoing discussion assumed that public sentiment can strongly influence police departments to enforce the criminal law vigorously despite other incentives that push them in the opposite direction. In some situations, such sentiment, or even the anticipation of its expression, may lead police or their superiors to ignore altogether the risk of damages and to pursue a criminal investigation in a manner they know or suspect is illegal. Consider, for instance, the following scenarios: a serial killer on the loose; a man suspected—but not at the probable cause level—of molesting a child; or a gang terrorizing a neighborhood. Strongly motivated to handle such cases expeditiously, law enforcement officials might be especially willing to forge ahead with highly questionable tactics if damages are the only possible punishment, comforted by the prediction that the public will ultimately applaud their actions regardless of any financial penalty subsequently incurred.

Note first that the exclusionary rule will not necessarily act as much of a deterrent in such situations either. If the primary purpose of the illegality is immediate incapacitation rather than conviction, as might be the case in the gang example, the rule is an irrelevant consideration. Even when conviction is the primary goal, the calculation may be that exclusion will not prevent its realization because other means of securing that verdict (attenuated confessions, inevitable discovery of corroborating evidence, etc.) are likely to be available.²²³

Second, appropriately structured, damages can be a powerful deterrent here as well. The typical response of tort law to such situations is punitive damages levied against the malicious offender. If the facts suggest that the officer not only knowingly violated the Fourth Amendment, but did so with the purpose either of obtaining evidence

governed by those rules." Heffernan & Lovely, *supra* note 6, at 345. Although they are undoubtedly right that some mistakes are inevitable, the mistakes they cite to bolster this point (i.e., participants did not understand the Fourth Amendment distinctions between luggage inside a car and outside a car and between mobile and stationary homes, *id.* at 344) do not seem all that ineradicable.

Further, an exception to strict liability should probably exist if the basis for liability is a "new rule" rather than application of an existing rule. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (setting out equitable guidelines for retroactivity in civil cases). In new rule situations, liability is most unfair and most unavoidable; training programs cannot teach rules that do not yet exist. Cf. John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 101 (1989) (arguing against liability for "failure of prescience"). The downside of such a compromise is the difficulty of determining whether a rule is "new" or not. Cf. *String v. Black*, 503 U.S. 222, 238 (1992) (attempting to define "new rule" for retroactivity purposes); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (same). Further, such an exception would of course deny compensation to those who argue for the "new rule." See Lewis & Blumoff, *supra* note 146, at 835-36.

223. See *supra* note 39.

to be used at trial or of unnecessarily harming the target of the search, such damages should be assessed. Additionally, a showing that the department hierarchy ratified the action, equivalent to the showing demanded by the policy and custom limitation in § 1983 actions,²²⁴ should make the department liable for punitive damages as well.

As a further method of deterring knowing transgressions of the Fourth Amendment, the department could be made liable for all knowing and reckless violations (whether resulting in punitive damages or not) even when it is *not* complicitous, but with an escape hatch. Analogous to the framework for fining corporations under the federal sentencing guidelines,²²⁵ the department could be permitted to avoid such exposure if it could show that it cooperated with the investigation into the police action and that it made a meaningful post-offense response to the culprit. At the least, the latter response should include a refusal to indemnify (assuming indemnification has not been prohibited), but it might often involve some type of administrative sanction as well. This approach would force the department to choose between paying twice (e.g., the indemnification and its own penalty) and sending the miscreant officer a strong message that it does not support the illegal action. The hope, of course, is that it would often choose the latter option.²²⁶

If knowing and reckless acts are punished in such fashion, police and police departments are unlikely to adopt the “bad man” technique²²⁷ of paying for their illegality in most of those cases where outside pressures tempt them to do so. The previous discussion about overdeterrence of police departments opened with the observation that private corporations can pass on costs much more easily than po-

224. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978).

225. See generally Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 237-38 (1993) (stating that under the federal guidelines, “[i]f . . . the organization strongly signaled its intolerance of lawbreaking by voluntarily disclosing the offense, fully cooperating with enforcement officials in the investigation, and/or demonstrating acceptance of responsibility for the offense, it will receive a lesser penalty”).

226. This scheme should also go far toward undermining the incidental reward phenomenon discussed *supra* text accompanying notes 51-55. For further discussion of how the combination of indemnification and departmental intransigence undermine deterrence under § 1983, see Patton, *supra* note 79, at 767-94.

Note that the proposals in the text are contrary to the Supreme Court’s holding in *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), which held municipal governments immune from punitive damages under § 1983. The Court was concerned that such damages would overcompensate the plaintiff, *id.* at 267, and be too costly, *id.* at 270-71. Punitive awards would not have to go to the plaintiff (for instance, the agency could keep them to defray its costs), and the cost to government can (and hopefully would) be diminished through the mitigation exception described in the text.

227. Professor Walter Dellinger was the first to use this metaphor in connection with damages actions. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (arguing that damages remedies might tempt the police “to view the Constitution as Justice Holmes’s ‘bad man’ viewed the obligation of contracts, which is to say that they might view the amendment as creating a duty to pay damages if it is violated ‘and nothing else’”).

lice departments.²²⁸ This distinction puts police departments among the organizations most likely to respond to punitive damages, perhaps even more so than they would to the threat of exclusion.

Let us assume, however, that even stiff punitive monetary sanctions would not be as effective a deterrent as the exclusionary rule in some few "big" cases in which police desperately want a conviction. At some point, we perhaps should ponder: should police be prevented from acting unconstitutionally if they have diligently explored every legitimate alternative (a strategy a damages regime is likely to encourage) and they are willing to pay the price? I am not sure liberals would or should sacrifice all such cases on the altar of the Fourth Amendment.²²⁹

4. *Underdeterrence of Magistrates*

For reasons given earlier, a damages regime is better than the exclusionary rule at balancing the influences that operate on trial and appellate judges who construe the Fourth Amendment. Thus, the former remedy is less likely to generate either underenforcement or overenforcement by those types of courts. However, magistrates charged with administering the warrant process are faced with a different incentive structure. These judicial officers, like all others, are immune from suit.²³⁰ Accordingly, if the exclusionary rule were abolished, magistrates would face no formal disincentive for issuing invalid warrants—knowingly, negligently, or otherwise—except dismissal on the grounds of incompetence.

Of course, the scenario just depicted almost perfectly describes the reality under today's version of the exclusionary rule. Since the Supreme Court's decision in *Leon v. United States*,²³¹ magistrates know that, unless a warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or some other egregious error or obvious surrender of neutrality is evident, exclusion will not occur.²³² Thus, from a deterrence perspective, a damages regime without an exclusionary supplement would not represent a significant change from the system that currently exists.

228. See *supra* text accompanying note 210.

229. Later in this article, I note that if the government response is grossly disproportionate to its interests in crime control (e.g., a flagrantly illegal search to obtain evidence for a misdemeanor), the Due Process Clause might call for exclusion. See *infra* notes 345-54 and accompanying text. That version of the rule is not based on an instrumental analysis, however, and in any event would not result in exclusion in the serious criminal cases discussed in the text.

230. See *Stump v. Sparkman*, 435 U.S. 349, 362-63 (1978) (holding that judges have absolute judicial immunity in § 1983 damages actions even when they take actions in excess of their authority, or act maliciously or corruptly, so long as they have jurisdiction over the subject matter, and the acts they take in regard to it can be characterized as "judicial").

231. 468 U.S. 897 (1984).

232. *Id.* at 923.

To a liberal (who presumably disagrees with the *Leon* result), that is not a persuasive justification for adopting a damages regime, however. A better justification is that even if *Leon* were reversed, magistrates would pay no more or less attention to the Fourth Amendment than they already do based on their moral predilections. While reversal by an appellate court might damage the judicial pride,²³³ it probably has even less impact on the bungling magistrate than it does on the blundering police officer. First, it is so rare, and comes so long after the issuance of the warrant when it does occur, that it falls far short of the “punishment” a behaviorist would seek. Furthermore, because magistrates, by constitutional and practical definition, are not “engaged in the often competitive enterprise of ferreting out crime,”²³⁴ any loss of conviction resulting from a Fourth Amendment mistake has no direct effect on them. Perhaps most importantly, that result also has no direct effect on their superiors, who have the ultimate task of ensuring that magistrates are competent. Thus, it is not surprising that a noticeable number of “rubber-stamping” magistrates exist.²³⁵

One solution to these problems, analogous to the proposal concerning police liability, would be to abrogate judicial immunity for magistrates and hold them personally liable for searches conducted pursuant to an invalid warrant, at least when the magistrate has reason to know it was invalid. A slightly less radical proposal is to maintain judicial immunity, but make the employing judicial entity liable for such searches and seizures. This scheme would help ensure that magistrates, who in many jurisdictions lack any formal legal education,²³⁶ will be adequately trained to do their job and relieved of their position if they do not. Further, imposition of liability on the judicial

233. See Alschuler, *supra* note 2, at 355-56.

234. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“[The Fourth Amendment’s] protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”).

235. Van Duizend and his coauthors found that

the majority of the search warrants in each city were reviewed by only a few of the magistrates. This was due, in part, to the location of the magistrate’s court in a high crime area or adjacent to the police headquarters, or to the duty hours of the judge or judges involved. But this concentration was augmented by the police practice of selecting the judge with whom an individual officer feels comfortable or who is perceived as less likely to raise questions.

VAN DUIZEND ET AL., *supra* note 48, at 47-48; see also Duke, *supra* note 63, at 1408 (“The warrant practices described in the NCSC study are a litany of perversions of the Fourth Amendment. Many of the magistrates regarded themselves as adjuncts to law enforcement.”); Kamisar, *supra* note 2, at 571 (suggesting that “rubberstamping” may be prevalent because of the time pressures on most magistrates and because American judges are used to relying on the parties to develop the issues, which does not occur in the one-sided warrant application process).

236. According to a study conducted in the 1970s, approximately 40 states allowed nonlawyers to function as magistrates, and such magistrates numbered roughly 13,000 to 14,000 nationwide. See LINDA J. SILBERMAN, *NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY* 24-25 (1979).

organization as a whole is unlikely to have the inhibiting effect that individual liability would. Actual payment of damages would be a rare event,²³⁷ but it would stimulate much more concern over judicial competence than the exclusionary rule does.

The practical problems with such a scheme might be overwhelming, however.²³⁸ If so, perhaps all that can be done to ensure some deterrence in this situation is to maintain police and departmental liability. Personal liability for a warrant-based search based on recklessness should be rare because the police are entitled to assume magistrates will do their job,²³⁹ and because, as argued earlier, they should be encouraged to obtain warrants. For the same reasons, strict departmental substantive liability, although advisable elsewhere, should not apply in this context; the department should only be liable if the officer should have known the warrant was invalid (i.e., was negligent). Even so limited, a damages regime would discourage police misuse of warrants at least to the same extent as the exclusionary rule, for great deference to warrant-based searches existed even before *Leon* was decided.²⁴⁰

E. Conclusion: A Tort or an Administrative Remedy?

If it has demonstrated nothing else, the foregoing discussion has made clear the difficulty of fashioning a legal framework that imposes the optimal degree of deterrence on police, police institutions, and the courts. That this problem is complex and perhaps not entirely solvable is not an argument for the exclusionary rule, however. It is the rule's relative impotence as a means of motivating constitutional behavior that should be the starting point of the discussion. Instead of defend-

237. According to the NCSC study, which took place prior to *Leon*, only five percent of all searches based on warrants result in suppression. See VAN DUIZEND ET AL., *supra* note 48, at 42. However, it should also be noted that, under a meaningful damages regime, the percentage of warrant-based searches found illegal would undoubtedly increase because people who are not prosecuted would be able to litigate the issue.

238. For instance, a court levying damages against a judicial bureaucracy may create insurmountable conflict-of-interest problems. Further, every challenge of a warrant-based search in which reckless behavior is charged might require joining three parties—the officer, the department, and the judiciary.

239. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court held that a warrant does not immunize an individual officer under § 1983 if a “reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” *Id.* at 345. As the majority stated, “[t]he officer cannot excuse his own default by pointing to the greater incompetence of the magistrate.” *Id.* at 346 n.9. But, as Justice Powell’s concurring opinion in that case emphasized, “substantial weight should be accorded the judge’s finding of probable cause in determining whether [police] will be personally liable.” *Id.* at 346 (Powell, J., concurring).

240. See *supra* note 237. Such deference is appropriate because independent investigation and internal screening by a police superior or a governmental lawyer usually precede a warrant application. See VAN DUIZEND ET AL., *supra* note 48, at 19-21. If such investigation and screening were not present, then a case of negligence (at least) might be made out. Cf. Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 932 (1986) (arguing that exclusion under *Leon* is appropriate under these circumstances).

ing the rule, liberals should be thinking about more effective ways of regulating the police.

Toward this end, this part of the article has proposed a hybrid system with components borrowed from both tort and administrative law. The principal tort component, proposed to ensure that victims of illegal searches and seizures have an incentive to sue and are compensated for constitutional wrongs committed against them, is the damages remedy. Taken from the administrative law model are the agency-as-litigator concept and the bench trial.

The defense of this proposal has focused on the deterrence issue. Several other types of objections to it can be anticipated. For instance, in addition to those objections that might be derived from the aforementioned precedent construing federal damages statutes,²⁴¹ at least two possible constitutional caveats might be raised against the hybrid approach. The first is that any proceeding that exacts damages violates the Seventh Amendment and analogous state constitutional provisions if a jury is not involved in the decisionmaking.²⁴² The second is that, under separation-of-powers doctrine, an executive agency may not have the authority to decide whether a constitutional claim is meritorious;²⁴³ yet that is the natural effect of giving an administrative agency the power to screen Fourth Amendment cases.

Whether these objections would sink the proposed system, or can somehow be accommodated with only minor adjustments, is unclear.²⁴⁴ If they prevail, one obvious response is to provide for juries

241. See *supra* notes 145, 156 and accompanying text.

242. The Seventh Amendment requires a jury trial “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars.” U.S. CONST. amend. VII.

243. Cf. *Davis v. Passman*, 442 U.S. 228, 242 (1979) (“[W]e presume that justiciable constitutional rights are to be enforced through the courts.”).

244. The Supreme Court’s cases suggest that a right to jury trial exists when damages are sought in an action that existed at common law at the time the Constitution was drafted. See CHARLES WRIGHT, *LAW OF FEDERAL COURTS* § 92, at 609 (4th ed. 1983) (“The practice of the common law in 1791, when the amendment as adopted, is made the standard . . .”). Clearly, damages suits alleging the equivalent of a Fourth Amendment claim occurred during colonial times. See Amar, *supra* note 3, at 785-87, 818 n.228. But Professor Amar’s assertion that such cases “flourished” in those times, *id.* at 786, has been vigorously challenged. See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local v. General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1176-77 (1998) (“No evidence for this proposition has ever been produced . . .”). Further, to the extent juries were involved, they played an extremely limited role because the judge controlled the liability issue, the evidence the jury heard, and the types of people who sat on the jury. See *id.* at 1178-81. It might also be relevant that the regime proposed here conceptualizes “damages” exacted from police officers primarily as a deterrent penalty obtained through suits brought by government attorneys rather than as compensation; its purpose is thus substantially administrative. Cf. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm.*, 430 U.S. 442, 455 (1977) (holding Seventh Amendment inapplicable where the government sues to enforce “statutory public rights”).

The separation of powers problem can probably be finessed by giving persons a cause of action to enjoin the agency to act when they are dissatisfied with the agency’s failure to bring suit. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 560 (1975) (allowing suit in federal court attacking agency’s action as arbitrary and capricious).

and opt for purely private actions.²⁴⁵ But, as already explained, the cumbersome nature of the jury process, as well as its likely bias against many of the plaintiffs who bring search and seizure claims, will undermine the deterrent effect and law-making capacity of the system. Leaving the screening process to private attorneys may also undermine the system's effectiveness, both because some meritorious claims may not be brought despite the lure of liquidated damages and because frivolous claims might proliferate. Furthermore, to the extent discovery and other time-consuming and expensive procedures are important in a search and seizure case, a government entity is more likely to succeed than a private attorney.²⁴⁶

If the Seventh Amendment and separation-of-powers objections prevail, a preferable alternative would be a system fashioned more directly on a pure administrative model, using administrative law judges in addition to agency-based litigators.²⁴⁷ The money paid by police and police institutions would be conceived of purely as penalties, and would go to the administrative agency, not to the victims of the search and seizure. Compensation of the latter individuals would be left to the existing, separate civil system. Victims who experience only "inchoate" injury, and who might therefore not make themselves known to the agency, could be encouraged to come forward through "bounty hunter" provisions of the type familiar to a number of administrative regulatory schemes.²⁴⁸

Indeed, the pure administrative model has several advantages over the hybrid model. First, it does a better job of paying for itself, since the money goes to the government instead of a private individual. The penalty model also finesses the unsavory spectacle of police officers and departments paying criminals.²⁴⁹ And it avoids the sticky distributive problems that arise in a civil action when numerous of-

245. See Amar, *supra* note 3, at 811-16.

246. Cf. Patton, *supra* note 79, at 761-62 (describing difficulties of obtaining discovery in § 1983 litigation cases concerning use of excessive force).

247. For one example of this model, consider the administrative enforcement mechanisms of the Environmental Protection Agency. See, e.g., Clean Water Act, 33 U.S.C. § 1319 (1994); Clean Air Act, 42 U.S.C. § 7413 (1994).

248. See, e.g., Rivers & Harbors Act of 1899, 33 U.S.C. § 411 (1994) ("In the discretion of the court, one-half of said fine [is] to be paid to the person or persons giving information which shall lead to conviction."); False Claims Act, 31 U.S.C. §§ 3729-3733 (1994) (encouraging whistle blowing).

249. Some commentators have argued that people who abuse their rights to privacy and autonomy for the purpose of committing crime sacrifice those rights. See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1491-95 (1996); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1248-56 (1983). On this view, remedial actions undertaken by or on behalf of guilty persons could be conceived solely as utilitarian means of achieving protection of society as a whole; they are not vindication of personal constitutional rights because such litigants have none. If this position is correct, even a damages regime would not have to transmit the money to those litigants who are convicted of crime.

ficers or numerous victims are involved in an illegal search.²⁵⁰ As an efficient deterrent device, this system may be superior to any other.

However, it has at least two drawbacks. First, it adds still another sanctioning system (in addition to damages, criminal, and internal police actions), which increases the chances of conflicting signals and may create other practical problems.²⁵¹ Second, as already indicated, separation-of-powers doctrine may prohibit executive officials—in this case administrative law judges—from construing the Constitution,²⁵² which presents an obvious obstacle to the entire concept of enforcing the Fourth Amendment administratively.

Whether a tort model, an administrative model, or a hybrid thereof is chosen, the final product will be a better deterrent of police than the exclusionary rule if it ensures that most illegal search victims (innocent as well as guilty) bring their claims and if it ensures that police and police departments bear meaningful financial loss as a result. With such a system in place, and assuming it is not unduly costly (an issue addressed in part IV), the liberal desiring effective police enforcement of the Fourth Amendment should suffer no pangs of regret at letting go of the exclusionary rule. What remains to be seen is whether there exist any nonutilitarian reasons for hanging on to it.

III. NONINSTRUMENTAL JUSTIFICATIONS FOR EXCLUSION

The liberal defense of the exclusionary rule does not rest on deterrence alone. Indeed, some writers think the rule's instrumental ef-

250. For instance, if one officer illegally searches a house with multiple occupants, does each occupant receive the liquidated damages sum or is it divided among them? If several officers illegally search a person's house, does each have to pay the full sum, or is it divided among them?

251. Issues concerning collateral estoppel, prioritization of causes of action, discovery, and so on, would be complicated by an additional system. However, in areas such as those dealing with environmental regulation, such a multiprong regime has worked relatively successfully, partly because the EPA does a conscientious job of triaging, i.e., bringing or withholding the administrative action depending upon other developments in the system. See generally David T. Buente, Jr., et al., *The "Civil" Implications of Environmental Crimes*, 23 ENVTL. L. INST. 10,589 (1993) (discussing how EPA handles multiple proceedings).

252. See *supra* text accompanying note 243. An argument can be made, however, that providing Article III court review of the administrative tribunal's "factual and legal determinations" would avoid the problem. See Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 139 (1988) (making this argument); see also *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (reasoning that Article III courts are generally to decide cases involving "private" rights but "public" rights that are creatures of statute can be decided by administrative agencies). In the end, the separation of powers and Seventh Amendment issues may be directly related. Cf. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) ("[I]f a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as fact finders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."); *supra* note 244.

facts are irrelevant.²⁵³ The rule must continue, they argue, because it is constitutionally mandated.

The Supreme Court has firmly disagreed with this position for the past twenty-five years.²⁵⁴ The exclusionary rule, the Court declared in *Calandra v. United States*,²⁵⁵ is not derived from the Constitution but rather is merely a judicially created remedy that continues to exist solely for its alleged deterrent effect.²⁵⁶ In a number of decisions, the Court has made clear that in those situations where it believes deterrence is minimal, the rule does not apply.²⁵⁷ If one agrees with this reasoning, and with the reasoning and proposals in part II of this article, then one has to conclude that the exclusionary rule should be abolished forthwith.

The liberal has several rejoinders to the Court's purely instrumental view, however, all of which rely on Court precedent that antedates or ignores case law adopting the purely instrumental approach. First, consistent with Court precedent over one century old,²⁵⁸ the liberal might argue that the exclusionary rule explicit in the Fifth Amendment applies not just to interrogations and the like but to searches and seizures as well, given their compulsion of incriminating evidence. Second, the strong property-protection orientation of some of the Court's early decisions on the Fourth Amendment might provide a limited basis for excluding certain types of evidence.²⁵⁹ Third, one can make a logical argument, based on decade-and-a-half old Supreme Court law,²⁶⁰ that exclusion is required as a way of restoring the parties to the status quo ante. Fourth, the rule can be seen as a form of judicial review, mandated by *Marbury v. Madison*.²⁶¹ Finally, *Mapp's* insinuation that use of illegally seized evidence unconstitutionally taints the adjudication process, together with the 1954 case of

253. See, e.g., *Kamisar, supra* note 2, at 658 ("I do not think the life of the exclusionary rule should depend on an empirical demonstration of its effects on police behavior . . .").

254. At the Supreme Court level, the deterrence rationale for the exclusionary rule probably made its first appearance in 1949, in *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 798 (1949), and *Wolf v. Colorado*, 338 U.S. 25 (1949). It was also relied on in part in other cases. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960). See generally *Kamisar, supra* note 2, at 598-99 n.210. However, *United States v. Calandra*, 414 U.S. 338 (1974), decided a quarter century ago, marked the first explicit acceptance of deterrence as the sole rationale for the rule.

255. 414 U.S. 338.

256. See *id.* at 348.

257. See, e.g., *United States v. Leon*, 468 U.S. 897, 918-20 (1984) (holding that exclusion is not mandated when officer reasonably relies in good faith on a warrant, because he is not deterable in this situation); *United States v. Havens*, 446 U.S. 620, 626-28 (1980) (holding that illegally seized evidence may be used to impeach because prohibiting such use would not add to deterrence provided by exclusion in prosecution's case-in-chief); *United States v. Janis*, 428 U.S. 433, 457-60 (1976) (finding exclusion not mandated in IRS proceedings because exclusion at criminal trial is sufficient).

258. See *Boyd v. United States*, 116 U.S. 616 (1886).

259. See, e.g., *Weeks v. United States*, 232 U.S. 383, 389-92 (1914); *Boyd*, 116 U.S. 616.

260. See *Nix v. Williams*, 467 U.S. 431, 443-44 (1984).

261. 5 U.S. 137 (1803).

Rochin v. California,²⁶² could form the basis for a broad due process right to exclusion.

The following discussion briefly reviews each of these theories, all of which have been treated at length elsewhere. Even from a liberal point of view (which is the view taken in the discussion), the status quo ante and judicial review theories are untenable. The Fifth Amendment, property, and due process arguments, on the other hand, might have some substance, but they only go so far. The Fifth Amendment and property-oriented bases for the rule at most extend to seizures of property the Court once labeled “mere evidence,” which today encompasses only a very narrow category of items. The due process argument is only persuasive where the police acted so culpably that they impugn the entire criminal process. In combination, the constitutional arguments lead to an exclusionary rule that applies only when government illegally seizes private papers or flagrantly violates the Fourth Amendment.

A. *The Fifth Amendment Theory*

Any discussion of the exclusionary rule in American constitutional law must begin with *Boyd v. United States*.²⁶³ In that 1886 case, the Supreme Court held that a business invoice obtained through a subpoena should be excluded from a forfeiture proceeding because:

[A] compulsory production of the private books and papers of the owner of goods . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.²⁶⁴

Boyd was the first time the Court invoked the Fourth Amendment as a basis for excluding evidence. But, as the quoted passage makes clear, the Court thought that amendment needed support from the Fifth Amendment to achieve the desired result of exclusion.

The Court apparently resorted to the Fifth Amendment because, unlike the Fourth Amendment, it states an explicit rule of exclusion with its pronouncement that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”²⁶⁵ Of course, with its reference to “witness” and “criminal cases,” this passage seems to prohibit only use of *testimony* in a *criminal proceeding*, not inanimate items obtained through a search and seizure. But Justice Bradley’s

262. 342 U.S. 165 (1952).

263. 116 U.S. 616 (1886).

264. *Id.* at 634-35.

265. U.S. CONST. amend. V. As Justice Black observed in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Fifth Amendment “in and of itself directly and explicitly commands its own exclusionary rule—a defendant cannot be compelled to give evidence against himself.” *Id.* at 498 (Black, J., concurring).

opinion for the Court essentially ignored these potential limitations by maintaining that "the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself."²⁶⁶ The Court's rechristening of documents as "testimony" made possible its application of the Fifth Amendment's exclusionary rule to the compulsory process involved in *Boyd*.

This basis for the rule is a tenuous one, however. First, at most it applies to seizure of documents; guns, drugs, and money are not "testimonial" by any stretch of the imagination. Furthermore, Supreme Court decisions in the last quarter of the twentieth century have decimated *Boyd*'s reasoning even as applied to written expression. In 1976, *Fisher v. United States*²⁶⁷ held that a subpoena generally compels nothing of incriminating value: it clearly does not compel creation of the contents of the document²⁶⁸ and, although it does compel production of the document, the act of production normally is not incriminating.²⁶⁹ Later that term, the Court's decision in *Andresen v. Maryland*²⁷⁰ applied the same reasoning in holding that a documentary seizure *by the police* does not implicate the Fifth Amendment; such a seizure not only does not compel creation of the document, it does not even compel the searched person to produce the evidence (in contrast to a subpoena).²⁷¹ *Fisher* and *Andresen* eliminated the Fifth Amendment as a candidate for a constitutional basis for the exclusionary rule.

Undaunted, the liberal might insist that *Boyd* was right in its equation of subpoenaed documents with compelled testimony, and contend further that *all* nonconsensual seizures of documents (including those by the police) trigger the Fifth Amendment's protection against compulsion. But this position is antithetical to liberal dogma even more fundamental than exclusion. Most documents sought by subpoena or search warrant are business records relevant to administrative and criminal investigations of business entities. The expansive reading of the Fifth Amendment just described would mean the government could never obtain such documents unless they were voluntarily surrendered. In other words, as William Stuntz has pointed out,

266. 116 U.S. at 633.

267. 425 U.S. 391 (1976).

268. *See id.* at 409.

269. *See id.* at 410-13 ("The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."). In any event, the government can usually immunize the act of production.

270. 427 U.S. 463 (1976).

271. *See id.* at 473 ("[P]etitioner was not asked to say or do anything. . . . The search for and seizure of these records were conducted by law enforcement personnel.").

such a reading pretty much ends the regulatory state,²⁷² a consequence most liberals would probably regret.

Even a “liberal” reading of the Fifth Amendment, then, leaves us with a rule that excludes nothing but truly “private papers and letters,” to use *Boyd*’s language. That rule would apply in an infinitesimally small number of cases.²⁷³ Moreover, such a rule would always be subsumed by the property-based rule that derives directly from the Fourth Amendment.

B. The Property Theory

Although one would not know it from reading those pre-*Calandra* opinions which cite *Boyd* approvingly when excluding items such as alcohol and drugs,²⁷⁴ the Fifth Amendment theory of exclusion is incoherent as a justification for excluding nondocumentary evidence. Even if the witness/testimony language of the Fifth Amendment could somehow be tortured to cover such evidence, doing so would eliminate the state’s ability to use any items discovered through searches and seizures, no matter how legal the seizures were under the Fourth Amendment. For the Fifth Amendment excludes *all* compelled testimony, whether or not it was obtained by police who had probable cause.

Perhaps this was why *Weeks v. United States*,²⁷⁵ which adopted the exclusionary rule in the federal courts, made only passing reference to *Boyd*²⁷⁶ and appeared to be grounded solely on the Fourth Amendment.²⁷⁷ In *Weeks*, the Supreme Court recognized a completely different theory of exclusion—one based on property rights. The evidence suppressed in *Weeks* consisted of letters seized by police who had neither a warrant nor, apparently, probable cause authoriz-

272. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 427-28 (1995) (reasoning that had *Boyd* been given its full scope, “the modern regulatory state would have been dead almost before it was born”).

273. Note that the verbal equivalent of private documents and papers—i.e., conversations—are excludable under a Fifth Amendment rationale, but again only if coerced. Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966). Conversations intercepted through surveillance—the typical search and seizure issue raised in connection with verbal evidence—are not compelled, even in the broad sense that the typical search for physical evidence “compels” the evidence seized. Note further that the Fifth Amendment rationale does not require exclusion of private papers seized from third parties because such papers are not *self-incriminating*. Cf. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (involving search of a newspaper office for evidence against perpetrators of an assault).

274. See, e.g., *Marron v. United States*, 275 U.S. 192 (1927) (liquor); *Agnello v. United States*, 269 U.S. 20 (1925) (drugs).

275. 232 U.S. 383 (1914).

276. *Boyd* is mentioned in two ways, first as a source of information about the origins of the Fourth Amendment, *see id.* at 389-91, and second for the proposition that the Fourth Amendment protects against illegal actions by both government and its individual officers. *See id.* at 394, 398.

277. Although the Court noted that the accused asserted both his Fourth and Fifth Amendment rights, *id.* at 393, it went on to speak solely of the protection afforded by the Fourth Amendment.

ing the seizure. The Supreme Court justified suppression on the simple ground that, because the letters had been obtained in violation of the Fourth Amendment and the defendant had made "seasonable application" for their return, the government could not retain them.²⁷⁸ The Court's strong language is worth repeating:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.²⁷⁹

Like *Weeks*, *Boyd* had also contained a considerable amount of discussion about the Fourth Amendment's protection of "private documents."²⁸⁰ *Weeks*'s contribution was that the Fifth Amendment is not needed to justify exclusion of such evidence when it is illegally seized. At the same time, contrary to *Boyd*, *Weeks* strongly indicated that papers that were *legally* obtained under the Fourth Amendment could be used at a criminal trial.²⁸¹ That difference between the cases follows from *Weeks*'s unwillingness to rely on the Fifth Amendment's prohibition against using any and all compelled testimony.

The central issue under the property theory of exclusion is the type of property the government must return. Although *Weeks* did not address this issue, both *Boyd* and post-*Weeks* cases applying *Boyd*'s discussion of property interests did. For instance, *Boyd* stated that "stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from . . . a man's private books and papers In the one case, the government is entitled to the possession of the property; in the other it is not."²⁸² *Gouled v. United States*²⁸³ made clear that this type of distinction would continue after *Weeks*'s explicit adoption of a property-based rationale for the rule. *Gouled* differentiated between private papers

278. See *id.* at 398 ("[H]aving made a seasonable application for [the illegally seized letters'] return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and . . . the court should have restored these letters to the accused."). See generally BRADFORD WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 59-65 (1986).

279. *Weeks*, 232 U.S. at 393.

280. *Boyd v. United States*, 116 U.S. 616, 622-23 (1886) (identifying the issue in the case as whether "compulsory production of a man's private papers, to be used in evidence against him . . . is . . . an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution?").

281. See *Weeks*, 232 U.S. at 390-91 ("[C]onsistently with [the] guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures [goods and papers] could . . . be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.").

282. *Boyd*, 116 U.S. at 623.

283. 255 U.S. 298 (1920).

and other types of “mere evidence”²⁸⁴ that are entitled to special protection under the Fourth Amendment, and property in which the public may have an “interest” or right of “possession,” such as “when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.”²⁸⁵ The latter type of property could legitimately be seized because it did not legally belong to its possessor.

Put within *Weeks*'s framework, these cases stand for the proposition that the government has a superior interest in, and therefore does not have to return,²⁸⁶ illegally seized property that falls within the well-known triad: contraband (e.g., controlled substances); fruits of crime (e.g., stolen property); and instrumentalities of crime (e.g., burglary tools, betting slips).²⁸⁷ Most items obtained during a search fit into one of these categories. Thus, based on the Court's precedent, there is very little scope to exclusion under the property theory.

A creative liberal might beg to differ with at least one aspect of this analysis. While allowing a criminal to repossess contraband and stolen goods is hard for even the most defendant-oriented person to swallow, some types of instrumentalities are relatively untainted by crime. Thus, it might be argued, they should be returned if illegally seized. Indeed, that appeared to be the conclusion of the Warren Court in the pre-*Calandra* decision of *One 1958 Plymouth Sedan v. Pennsylvania*,²⁸⁸ which held that, because there “is nothing even remotely criminal in possessing an automobile,” a car used to transport liquor illegally could not be the subject of a civil forfeiture action.²⁸⁹

Plymouth Sedan's result cannot be sustained under a property theory properly understood, however. The predicate question under this theory, as *Boyd* and *Gouled* recognized, is solely whether the victim of the illegal search and seizure has a lawful interest in the item

284. See *id.* at 309-11. In *Gouled*, the Court excluded contracts and attorney's bills seized by the government because they were of only “evidential value,” in that it was “impossible to see how the government could have such an interest in such [papers] that under the principles of law stated it would have the right to take [them] into its possession to prevent injury to the public from [their] use.” *Id.* at 310.

285. *Id.* at 309. The opinion stated:

[A]t common law and as the result of . . . *Boyd* . . . [search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Id.

286. Not surprisingly, the Federal Rules of Criminal Procedure provide that litigants can only repossess items to which they are legally entitled. See FED. R. CRIM. P. 41(e).

287. See *Warden v. Hayden*, 387 U.S. 294, 301-03 (1967) (summarizing precedent establishing these three categories of seizable evidence).

288. 380 U.S. 693 (1965).

289. *Id.* at 699.

sought to be excluded. In the current world of wide-open forfeiture statutes,²⁹⁰ the government has the right to virtually any property that has been used for criminal purposes. To the extent these statutes are "valid exercises of the police power,"²⁹¹ to use *Gouled's* phraseology, the government does not have to return any property it designates as forfeitable items. Under the property theory, therefore, exclusion is not mandated in such cases.²⁹²

For similar reasons, other relatively benign instrumentalities may not be excludable under the property theory. Consider business records that are kept pursuant to statutory mandates. As the Supreme Court's "required records" doctrine suggests,²⁹³ such records, if not the outright property of government, are strongly imbued with a "public interest" (again using *Gouled's* language).²⁹⁴ In short, to the extent it is valid at all, the property theory, like the Fifth Amendment theory, requires exclusion only in a very small subset of cases.

C. *The Status Quo Ante Theory*

A theory of exclusion related to the property theory is that suppression is a remedial device, mandated to restore both the govern-

290. See, e.g., Florida's Contraband Forfeiture Act, which permits seizure of, inter alia, (1) virtually any equipment, currency, or other items connected with engaging in illegal drug trafficking, gambling, or controlled substances; (2) "[a]ny personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, record, research, negotiable instrument, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony," and (3) "[a]ny real property [or any interest in real property] which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony." FLA. STAT. ANN. § 932.701 (West Supp. 1999). See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42-56 (1998) (detailing the breadth of today's forfeiture statutes). The Florida statute could encompass even many kinds of items that have traditionally been seen as "mere evidence," including the "records" seized in *Gouled*, see *supra* note 284, and the clothing ("personal property") seized in *Warden v. Hayden*, 387 U.S. 294 (1967), the case which rejected *Gouled's* absolute ban on seizure of mere evidence.

291. *Gouled v. United States*, 255 U.S. 298, 309 (1921). There are some limitations on the forfeiture authority, but they are minimal. See *Alexander v. United States*, 509 U.S. 544, 544 (1993) (holding that forfeitures are subject to analysis under the Eighth Amendment's excessive fines clause); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 43-44 (1993) (requiring an adversarial hearing prior to the seizure of real property under the federal forfeiture statutes). But see Blumenson & Nilsen, *supra* note 290, at 56-100 (arguing for limitations on forfeiture statutes).

292. Note that even Heffernan, a modern-day adherent of the property theory, concludes that courts are only "obligated under the fourth amendment to grant a motion for the return of legally held property when a person having a lawful interest in it can show that the government seized it from her illegally." Heffernan, *supra* note 2, at 1254 (emphasis added). But see James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1283-84 (1983) (arguing that the property theory justifies excluding all evidence obtained in violation of the Fourth Amendment).

293. See *Shapiro v. United States*, 335 U.S. 1, 17-19 (1948).

294. See *Gouled*, 255 U.S. at 309; see also *Grosso v. United States*, 390 U.S. 62, 68 (1968) (describing the rationale of *Shapiro's* required records doctrine as based in part on the fact that the records "have assumed 'public aspects' which render them at least analogous to public documents").

ment and the victim of an illegal search or seizure to the status quo ante. As the most recent proponent of this theory explained it, the exclusionary rule “is just and fair simply because it puts the parties to a criminal prosecution back in the position they would have been in had the Constitution been respected.”²⁹⁵ Precedential support for this theory comes from the Supreme Court’s decision in *Nix v. Williams*,²⁹⁶ in which the Court sanctioned an exception to the exclusionary rule when the government can show that the government would inevitably have discovered the evidence through legal means. The basis for this holding, Chief Justice Burger explained, is that without such an exception the government would be worse off than if the illegality had never occurred.²⁹⁷ At the same time, he suggested, exclusion is fair when it “plac[es] the State and the accused in the same positions they would have been in had the impermissible conduct not taken place.”²⁹⁸

If even a long-time opponent of the rule such as Burger can endorse the concept,²⁹⁹ the status quo ante theory must have something going for it. But while it does explain the inevitable discovery exception to the exclusionary rule, it does not explain as satisfactorily why exclusion is mandated to begin with. Indeed, it is because the status quo ante concept so successfully explicates why government should not be deprived of illegally obtained evidence that could have been legally obtained that it ultimately fails as an explanation for exclusion.

One response to the status quo ante argument is that exclusion can’t possibly restore victims of illegal searches to their presearch positions; it cannot achieve the return of (most) seized property, for reasons explained in connection with the property theory, and it does not effectively restore victims’ “ruptured privacy,”³⁰⁰ at least when compared to damages. But the status quo ante argument is more complicated than that. The defendant’s “position” prior to the illegal search encompasses not just untrespassed privacy and possessory interests, but also the fact that the prosecution did not possess the evidence in question. The latter reality, so the argument goes, is the aspect of the parties’ relationship that exclusion is best at restoring.³⁰¹

295. Norton, *supra* note 2, at 284; see also Schroeder, *supra* note 2, at 655.

296. 467 U.S. 431 (1984). An even earlier statement comes from *Harrison v. United States*, 392 U.S. 219 (1968), although it was dictum in a footnote. See *id.* at 224 n.10 (“[T]he exclusion of evidence causally linked to the Government’s illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law.”).

297. See *Nix*, 467 U.S. at 447.

298. *Id.*

299. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (advocating replacing the rule with an administrative remedy).

300. This was the Court’s phrase in *Linkletter v. Walker*, 381 U.S. 618 (1965), in describing why new Fourth Amendment rules should not be applied retroactively. The Court’s full statement was: “[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” *Id.* at 637.

301. It has been argued that, even if the exclusionary rule does restore in this fashion, there is no legal right to such restoration, just as there is no cognizable right to damages for erroneous conviction and punishment. See Amar, *supra* note 3, at 795-96. The liberal’s response, of course,

In fact, however, the exclusionary rule rearranges rather than restores, in a way that favors defendants. This is most obvious in those cases, mentioned previously, where the Fourth Amendment violation has to do with execution rather than justification.³⁰² Consider, for instance, a scenario in which police with a valid warrant unnecessarily search at night or use excessive force in carrying out the search. Had these violations not occurred, the government still would have been able to obtain the evidence legally; indeed, there will generally be no causal link between such violations and the government's possession of the evidence. Thus, were the evidence obtained in these situations to be excluded,³⁰³ the government would be worse off (and the defendant better off) than in their presearch positions. The same can be said for a more central type of Fourth Amendment violation, where police with probable cause fail to obtain a warrant when they should have. Given the assumption of probable cause, the police could easily have obtained a warrant (if obtaining a warrant were not "easy" then exigency obviating the warrant would have existed).³⁰⁴ Thus, exclusion in such a situation would prevent the police from using evidence that could have been legally obtained; a true status quo ante regime would allow the police to demonstrate, at the time of the suppression hearing, that the warrant would have been issued.

This kind of reasoning unfortunately (for the liberal) extends even to searches conducted on less than probable cause. At the least, exclusion should not occur if the government can show that it could have developed probable cause independent of knowledge obtained from the search. Even if it cannot, exclusion is both overcompensatory (to the defendant) and undercompensatory (to the prosecution) because it does not recreate the start-it-all-over-again scenario the status quo ante theory demands. As Akhil Amar has stated, "[c]riminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs."³⁰⁵ One does not have to assume that these events are inevitable (a liberal certainly would not) to acknowledge that they could occur in a large number of cases (a liberal probably would). If so, even in lack-of-probable-cause scenarios exclusion can put the government in a worse position and the defendant in a better position than they occupied presearch. The status quo ante, by definition, is a position in which anything might happen. The exclusionary

is that the status quo ante argument is an attempt to *make* restoration a cognizable right and that exclusion is a more elegant (and probably less costly) way of achieving it than damages.

302. See *supra* text accompanying notes 167-72.

303. As noted earlier, see *supra* text accompanying notes 168-70, the evidence often is not excluded.

304. See Amar, *supra* note 3, at 794 ("The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the [illegally seized item] into evidence.").

305. *Id.*

rule, on the other hand, is truly determinist; it acts as if the only possible scenarios have already been played out.³⁰⁶

D. *The Judicial Review Theory*

Some version of the “right” to judicial review has been firmly established in this country since *Marbury v. Madison*.³⁰⁷ One interpretation of the right is that those who have suffered a violation of their constitutional rights are entitled to a remedy; as Chief Justice Marshall stated in *Marbury*, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded.”³⁰⁸ Under this theory of judicial review the exclusionary rule is obviously deficient, because it grants relief only to criminal defendants. A damages action, in contrast, can suffice as a “remedy” for all victims; certainly it is the only significant remedy available for violations of many other constitutional rights.³⁰⁹

Another version of the right to judicial review might be that courts must provide, in Professor Albert Alschuler’s words, “significant opportunities” to adjudicate Fourth Amendment rights.³¹⁰ Although the current damages regime is clearly inferior to the exclusionary rule in this regard,³¹¹ one would be hard-pressed to prove that these deficiencies are so significant they require exclusion, especially because elimination of the rule would probably drive more litigants to seek damages. In any event, for reasons given in part II, the remedy proposed in this article would be far better than either the current damages regime or the exclusionary rule at ensuring a fair reading of the Fourth Amendment.

Professors Thomas Schrock and Robert Welsh have argued that there is a third reason the right to judicial review might require the exclusionary rule.³¹² Their theory is similar to the status quo ante argument in that both aim at nullifying the consequences of the illegal search and seizure. But while the latter argument is remedial in focus, the judicial review theory is structural. In *Marbury*, Marshall established that “an act of the legislature, repugnant to the constitution, is void”³¹³ and that courts have the right and duty to make that finding and implement it by refusing to apply the statute in the case before

306. Exclusion still might be justifiable under this theory when the defendant can show the government could not have seized the evidence legally, but that occasion will be rare, given the virtually limitless ways the government can, in theory, obtain probable cause.

307. 5 U.S. 137 (1803).

308. *Id.* at 163.

309. See generally SCHUCK, *supra* note 104, at 182-83 (describing judicial attempts to “[s]ecur[e] justice in and against the activist state” by resort to “the one readily available compensatory channel: the remedy of official liability for damages,” as well as to injunctive relief).

310. See Alschuler, *supra* note 2, at 354.

311. See *supra* text accompanying notes 82-89.

312. See Schrock & Welsh, *supra* note 2, at 335-66.

313. 5 U.S. at 176.

them.³¹⁴ Based on this fundamental principle of our judicial system, Schrock and Welsh have argued that the fruits of searches and seizures repugnant to the Fourth Amendment cannot be used in court because, as a matter of law, the search is a “nullity.”³¹⁵ If the search, like a void statute, is a nullity, then use of its fruits, like a conviction under the void statute, cannot be countenanced by a court of law.³¹⁶ It is as if, for legal purposes, the search, like the invalid conviction, never happened.

On the surface, this is a powerful argument. But it has a significant flaw, alluded to by Justice Harlan in *Mapp v. Ohio* when he stated that the Fourth Amendment is not a provision designed to ensure a “fair trial” but rather is focused on restricting actions of the police.³¹⁷ Many writers, including Schrock and Welsh, have taken issue with this interpretation, principally by noting that the primary purpose of a search and seizure is obtaining evidence to support a conviction; accordingly, the search is, in Schrock and Welsh’s words, an “evidentiary transaction.”³¹⁸ Although this article has argued that evidence-gathering is often not the purpose of a search or seizure,³¹⁹ it cannot be denied that conviction ought to be the objective of most such actions. That being the case, Justice Harlan may be wrong (and the next section of this article argues he is wrong) to imply that searches and seizures are *never* connected to the courtroom. But Harlan’s insight that illegal searches and seizures are fundamentally different from most other unconstitutional events that might occur in connection with a criminal case is correct.

314. See *id.* at 177-78.

315. See Schrock & Welsh, *supra* note 2, at 356 (distinguishing between the rule as “sanction” and as “mere nullification”); *id.* at 359 (“[T]he Constitution as ‘given force and effect’ by the Marshall of *Marbury v. Madison* in his role as judge requires only that unconstitutional behavior of a governmental actor be declared invalid and void if brought before a court.”).

316. See *id.* at 345-47 (drawing an analogy between invalidating a conviction under the Smith Act on First Amendment grounds and exclusion under the Fourth Amendment).

317. See *Mapp v. Ohio*, 367 U.S. 643, 683 (1961) (Harlan, J., dissenting). Justice Harlan reasoned:

I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. [The rule is] an incidental means of pursuing other ends than the correct resolution of the controversies before it.

Id.

318. Schrock & Welsh, *supra* note 2, at 302; see also William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 374-75 (1939) (“[When] the purpose of the search [is] to obtain evidence, it is pure sophistry to declare, as courts frequently have done, that the search and the subsequent use of the evidence are distinct transactions.”); Schroeder, *supra* note 2, at 658 (reasoning that it is illogical to declare that a search and the later use of its fruits as evidence are “distinct events” when the “purpose of the search is to obtain evidence”); Yeager, *supra* note 2, at 120 (“[A]ll police investigation is so wrapped up in proof that locating the exact situs of constitutional error is an unhelpful way of resolving whether we should throw out evidence in criminal cases.”). See generally Schrock & Welsh, *supra* note 2, at 295-308.

319. See *supra* note 34.

To see why this is so, first consider the paradigmatic case envisioned by Justice Marshall—unconstitutional legislation. A court cannot sustain a conviction based on such legislation because, in effect, it no longer has jurisdiction over the case; the behavior at issue is not subject to criminal sanctions. Similarly, a proceeding could not be called “constitutional” if the defendant subject to it were deprived of counsel, the right to cross-examine, or the right to a jury, given the language of the Sixth Amendment,³²⁰ or were forced to testify, given the language of the Fifth Amendment.³²¹ More controversially, given the Supreme Court’s ambiguous precedent on the issue,³²² courts may act unconstitutionally when they permit admission at trial of evidence known to be unreliable. In contrast to all of these situations, nothing about admitting illegally seized evidence affects the fairness of the court’s process. The evidence is reliable and its admission does not conflict with any provision of the Constitution, not even the Fourth Amendment, because that amendment only regulates conduct outside the courtroom.³²³

In short, when viewed from the perspective of trial, an illegal search is *not* a nullity. More accurately, unlike most other unconstitutional actions associated with a criminal case, it does not transform the court’s process into a nullity. Thus, Schrock and Welsh’s judicial review theory does not dictate, or even plausibly support, exclusion.³²⁴ However, a second argument of theirs, addressed below, points to an-

320. “In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . to be confronted with the Witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

321. “No person shall . . . be compelled in any criminal case to be a witness against himself . . .” *Id.* amend. V.

322. Compare *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (establishing a “presumption” of inadmissibility for hearsay not governed by a firmly rooted hearsay exception, which can only be overcome by “particularized guarantees of trustworthiness”), with *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (“A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment.”), and *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983) (“We are unconvinced . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness . . .”).

323. Whether other out-of-court violations—e.g., *Miranda* violations and violations of the requirement in *United States v. Wade*, 388 U.S. 218 (1967), that counsel be present during post-indictment lineups—implicate the rights associated with a fair trial depend upon a number of factors too complicated and too tangential to address in this article. A key issue is whether these violations affect the reliability of the evidence so obtained. Another issue, relevant only to *Miranda* violations, is whether the Fifth Amendment’s prohibition of compelled testimony bars use of statements obtained in the absence of warnings. See generally Arnold Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).

324. The same conclusion can be reached with respect to the analogous argument that introduction of illegally seized evidence is a “second and distinct injury” from the illegal seizure itself. See Kamisar, *supra* note 2, at 594-96. No injury can occur at the time of trial if the Fourth Amendment violation is not a trial right.

other way in which an illegal search and seizure may affect the constitutionality of the trial.

E. *The Due Process Theory*

The central goal of Schrock and Welsh's article is to convince us that admitting illegally seized evidence represents an unconstitutional judicial condonation of the police action. As we have seen, the judicial review argument fails to accomplish this goal because it requires that we assume, contrary to both the text of the Fourth Amendment and the reality of criminal trials, that an illegal search and seizure automatically affects the fairness of the trial process. Schrock and Welsh canvass two other arguments in this vein that ought to be considered.

The first argument is that the rule is necessary to maintain "judicial integrity."³²⁵ Although eventually soundly rejected by the Supreme Court,³²⁶ this rationale for exclusion frequently appeared in its opinions prior to the 1970s. Most prominently, one of the reasons *Mapp* gave for the rule was the "imperative of judicial integrity."³²⁷ Justice Clark's majority opinion in *Mapp* went on to assert, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."³²⁸ As Schrock and Welsh themselves point out, however, this version of the judicial integrity justification is purely instrumental in nature (and worse, from their perspective, selfishly so, in that it uses the criminally accused to achieve the courts' ends).³²⁹ It might be added that, as an empirical matter, the rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law and involves prosecutors, defense attorneys and judges in

325. Justice Brandeis was perhaps the first Supreme Court Justice to advance this rationale for the rule. See *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (reasoning that exclusion is necessary "to maintain respect for law . . . [and] to preserve the judicial process from contamination"); see also *id.* at 470 (Holmes, J., dissenting) (speaking of the use of illegally seized evidence as "dirty business" and of exclusion as a necessary way of preventing "such iniquities to succeed"). Justice Brennan was the principal modern proponent of this basis for the rule. See *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) ("The exclusionary rule . . . [is meant to accomplish] the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government [will] not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.").

326. See *United States v. Leon*, 468 U.S. 897, 921 n.22 (1984) ("Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts 'is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose . . .'" (quoting *United States v. Janis*, 428 U.S. 433, 459 n.35 (1976))).

327. 367 U.S. 643, 659 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

328. *Id.* at 659.

329. See Schrock & Welsh, *supra* note 2, at 367 ("Instead of concern for the defendant's right to have the government proceed constitutionally throughout the whole prosecution, we find concern for the court's own integrity.").

charade trials in which they all know the defendant is guilty.³³⁰ If, as legitimacy-compliance theory predicts,³³¹ respect for authorities correlates with willingness to comply with the law, the effect of the rule might well be the opposite of Clark's prediction.

The instrumental version of "judicial integrity" is not the only version, however. Schrock and Welsh develop a more nuanced explanation of the integrity idea based on the Due Process Clause. Stated simply it is that "the defendant has a due process personal right to have the government observe its own laws, at any rate its own constitution, in its prosecution of him—and therefore to have the court exclude unconstitutionally seized evidence from his trial."³³² If the rule of law is to be taken seriously, they argue, courts must abide by it at all times, at least when that law is constitutional in origin.

Unfortunately, Schrock and Welsh's due process theory ends up begging the central question. As Professor Daniel Meltzer, along with many others,³³³ has pointed out, "whether the law must be applied in a defendant's case depends upon whether he has suffered a violation for which exclusion is an appropriate remedy."³³⁴ None of the theories reviewed so far—whether stemming from the Fifth Amendment, the right to one's own property, the right to be restored to the status quo ante, or the right to judicial review—provide grounds for concluding that it is appropriate as a remedy in the typical case.

Nonetheless, the Due Process Clause may provide liberals with one final chance at a constitutional basis for the rule, albeit a narrow one. The Court has indicated that, where another amendment in the Bill of Rights applies, due process is not controlling.³³⁵ But the Clause is still applicable where the particular amendments are not. In such

330. What John Kaplan said 25 years ago is even more true today:

The solid majority of Americans rejects the idea that "[t]he criminal is to go free because the constable has blundered." Indeed, this public dissatisfaction has recently become a major political force. Public opinion polls have shown an extremely high rate of disapproval of the courts for their role in "coddling criminals," and the prototype of these complaints is enforcement of the exclusionary rule.

John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-36 (1974).

331. See *supra* text accompanying notes 66-71.

332. Schrock & Welsh, *supra* note 2, at 369.

333. See, e.g., Dripps, *supra* note 240, at 919 ("So long as the gravamen of the Fourth Amendment is privacy, any essential connection between the wrong of the search and a subsequent official proceeding will remain somewhat mystical."); Heffernan, *supra* note 2, at 1227 n.87 (arguing that Schrock and Welsh's arguments "beg[] the question of whether courts, as well as officers of the executive branch, are obligated under the Fourth Amendment not to use evidence against an individual when that evidence was obtained through a violation of that individual's primary Fourth Amendment rights").

334. Meltzer, *supra* note 79, at 270.

335. See *Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("[W]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))).

cases, as Justice Harlan explained in *Griswold v. Connecticut*,³³⁶ the Due Process Clause “stands . . . on its own bottom.”³³⁷ Schrock and Welsh’s insight is that the Clause is implicated, “on its own bottom,” when a government action invalidates the *entire* process (as opposed to one facet of it). And a liberal could argue that such invalidation sometimes can occur, when the action “shocks the conscience.”

That phrase comes, of course, from *Rochin v. California*.³³⁸ There a unanimous Court nullified a state drug conviction that relied on the introduction of morphine capsules that had been obtained from Rochin’s vomit. That unappealing seizure occurred after police officers saw Rochin swallowing what appeared to be drugs, “jumped” on him and tried to force his mouth open to extract the capsules and, when that effort proved unsuccessful, took him to a hospital where doctors forced an emetic solution through a tube leading into his stomach.³³⁹ Despite the incoherency, noted earlier, of arguing that physical evidence is “testimony,” Justices Douglas and Black attempted to make *Rochin* a Fifth Amendment case.³⁴⁰ The rest of the Court treated it as a due process case, however. Justice Frankfurter, who had just three years earlier written in *Wolf v. Colorado*³⁴¹ that the exclusionary rule is purely a matter of “judicial implication . . . not derived from the explicit requirements of the Fourth Amendment,”³⁴² said for the majority in *Rochin* that “[i]t has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained.”³⁴³ Elsewhere he stated, “the Due Process Clause ‘inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.’”³⁴⁴ Taken together, these statements mean that, independent of the commands of either the Fifth or Fourth Amendments, the Due Process Clause requires reversal of a conviction obtained in egregious fashion, regardless of when in the process that action takes place.

Although *Rochin*’s due process analysis is sui generis among Supreme Court search and seizure cases, the principle that the Due Process Clause requires courts to nullify police actions so repugnant

336. 381 U.S. 479 (1965).

337. *Id.* at 500.

338. 342 U.S. 165 (1952).

339. *See id.* at 166.

340. *See id.* at 174 (Black, J., concurring); *id.* at 178 (Douglas, J., concurring).

341. 338 U.S. 25 (1949).

342. *Id.* at 28.

343. 342 U.S. at 172.

344. *Id.* at 169 (brackets in original) (citing *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)).

that they impugn the entire process is not unique to that case. It is also implemented in the Court's confessions cases excluding statements made during unduly coercive or deceptive interrogations, regardless of how reliable they might be.³⁴⁵ Additionally, it is recognized in the Court's entrapment cases, albeit so far only in dictum, when the government's inducements to commit crime are so outrageous that a conviction cannot stand regardless of the defendant's predisposition to commit the crime.³⁴⁶ The difficult issue associated with due process analysis is not whether it establishes a connection between evidence-gathering and evidence-using, but how to operationalize the "shock the conscience" language.

A liberal might argue that any Fourth Amendment violation meets that test. Indeed, many have roundly criticized Frankfurter's attempt to differentiate due process rights from other rights found in the Constitution.³⁴⁷ But, as already explained, there is nothing about the usual Fourth Amendment violation that requires nullification of the criminal adjudication. Furthermore, making the scope of due process coextensive with the Fourth Amendment and other amendments

345. See, for example, *Rogers v. Richmond*, 365 U.S. 534 (1961), in which Justice Frankfurter explained that "involuntary" confessions are excluded

not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Id. at 540-41. Even with the advent of Fifth Amendment analysis (which occurred a few years after *Rogers* in *Miranda v. Arizona*, 384 U.S. 436 (1966)), this due process test has independent significance. Both in coercion cases where custody is not involved, see, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) (applying due process analysis in a precharge, no-custody case), and in deception cases, see, e.g., *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (leaving open whether a police informant posing as an inmate violates due process), it is the only constitutional basis for relief.

346. See, e.g., *United States v. Russell*, 411 U.S. 423 (1973). Then-Justice Rehnquist, writing for the majority, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32. Along the same lines, the Supreme Court recently rejuvenated the "shock the conscience" test in *Sacramento v. Lewis*, 118 S. Ct. 1708, 1717 (1998), in the context of a civil rights suit. There the Court held that where a police chase does not amount to a Fourth Amendment seizure (because the suspect eludes capture) but was intended to harm the suspects physically or "to worsen their legal plight," then it would violate the Due Process Clause, see *id.* at 1720.

347. Francis Allen has observed:

Mr. Justice Frankfurter had become embroiled in a semantic mesh of his own making. To label a right as one "basic to a free society" is to say about as much as one can say of a constitutional protection. The right of petitioner Wolf had been so labelled; and yet, Mr. Justice Frankfurter for the Court had ruled in *Wolf v. Colorado* that the state need not exclude the evidence from the criminal trial.

Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 *ILL. L. REV.* 1, 252 (1950); see also Yale Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 *JUDICATURE* 66, 80 (1978) ("Nor, as I see it, can the reasoning of the court, by Frankfurter, in *Wolf*, be squared with its reasoning, by Frankfurter, in *Rochin* . . ."). These comments confuse substantive scope issues with remedial concerns; this article argues that the remedy for an illegal search and seizure (admittedly a violation of a "basic right") should only be exclusion if it is flagrant.

would remove the rationale for its existence. If liberals are to salvage anything from due process analysis, it is a rule that applies only when, as Justice Frankfurter suggested, the government conduct "is bound to offend even hardened sensibilities."³⁴⁸ Worth noting in this regard is that, of those countries that contemplate excluding illegally seized evidence, all similarly reserve exclusion for particularly egregious breaches of conduct.³⁴⁹

What type of conduct is outrageous, egregious, shocking to the conscience or, to use the word I prefer, flagrant?³⁵⁰ This is not the place to develop this difficult notion in depth,³⁵¹ but as a tentative matter, it might be said to refer to those actions that are grossly disproportionate to the government's interest in procuring evidence.³⁵²

348. 342 U.S. at 172.

349. In the United Kingdom, for example, judges have discretion to exclude evidence where its admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." Police and Criminal Evidence Act, 1984, ch. 60, § 78(1) (Eng.). Exclusion is rare under this provision. See Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 186-91 (1993). In Canada, exclusion is permitted when admission "would bring the administration of justice into disrepute." CAN. CONST. (Constitution Act, 1982) pt. I, § 24(2). One justice on the Canadian Supreme Court has construed this language to mean that "[w]hat should be repressed vigorously is conduct on [the authorities'] part that shocks the community." *Rothman v. The Queen* [1981] 12 D.L.R.3d 578, 622 (Can.) (Lamer, J., concurring). In Germany, exclusion occurs when the search is particularly brutal or when the invasion occasioned by the search is disproportionate to the crime under investigation. See Bradley, *supra*, at 208-12. In Australia, the Australian High Court has held that exclusion is dependent upon a number of factors, including whether there was "any deliberate disregard of the law by the police . . . a deliberate 'cutting of corners' [and] . . . the nature of the offense charged." Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia*, 19 INT'L & COMP. L.Q. 664, 674 (1980) (citing *Bunning v. Cross* (1978) 141 C.L.R. 54 (Austl.)). In New Zealand, although exclusion has never occurred, it is possible where "a wholly unwarranted and lengthy detention involving a wholly unwarranted search of a person and/or place" occurred. *Queen v. Lee* [1978] 1 N.Z.L.R. 481, 490 (P.C.). See generally Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 56-66 (1994).

350. One definition of flagrant is "extremely, flauntingly, or purposefully conspicuous usually because of uncommon evil." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 862-63 (1993). Both come very close to Frankfurter's requirement that the conduct "offend hardened sensibilities."

351. For one attempt, see MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 290.2(2)-(4), at 94 (Official Draft 1975) (requiring exclusion for a "substantial violation" of the Fourth Amendment, "substantiality" to be determined by reference to, inter alia, "the extent of deviation from lawful conduct," "the extent to which the violation was willful," and "the extent to which privacy was invaded"). For other takes on this issue, see Havey Wingo, *Rewriting Mapp and Miranda: A Preference for Due Process*, 31 U. KAN. L. REV. 219 (1983) and Lane V. Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343 (1980).

352. This definition is probably equivalent to the types of actions that should (but normally do not) lead to criminal prosecution. Cf. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("[T]o declare that the Government may commit crimes in order to secure the conviction of a private criminal[] would bring terrible retribution."). Damages, both from the individual and the entity, should accrue in these situations as well, so long as the officer was acting as a police officer at the time of the illegal action. Cf. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (holding that imposing punitive liability on an insurance company under respondeat superior doctrine for fraud of an employee does not violate due process so long as the employee was acting as an employee at the time of the fraud).

Shoving a tube down someone's throat to obtain drugs, breaking into someone's house without a warrant and rummaging through bedrooms and personal papers to find obscene material,³⁵³ posing as a suspect's attorney in order to obtain evidence about a routine felony, or forcing a person to commit a serious crime might meet this test.³⁵⁴ More typical constitutional violations would not.

A practical advantage of a due process exclusionary rule limited to flagrant violations is that it probably more closely captures the type of misconduct the public at large would be unwilling to put up with even at the cost of losing a conviction. In other words, it not only reflects the category of evidentiary uses courts cannot constitutionally condone but also protects against loss of judicial integrity in the instrumental sense. The majority of the public undoubtedly agrees with Justice Cardozo that the criminal should not go free when the constable has "blundered."³⁵⁵ At the same time, when clear proof exists that the constable acted outrageously, even a citizenry invested in crime control may want to ensure the government does not profit from its wrong.

F. Summary

The debate about whether the exclusionary rule is constitutionally required is sometimes phrased in terms of whether the rule is a "personal right" under the Constitution.³⁵⁶ If it is, then it applies to suppress illegally seized evidence regardless of its instrumental effects. If it is not, then it is only one method, among many possibilities, of protecting against unlawful invasions, and should only be adopted if it is the most effective in a cost-benefit sense.

This part of the article has argued that, even from a liberal's perspective, the exclusionary rule is a very limited personal right. The property theory (and the Fifth Amendment theory, if stretched) do provide a personal right to exclude private papers that are illegally seized. The due process theory might expand that right to include searches and seizures that shock the conscience, which could be de-

353. These are the facts of *Mapp v. Ohio*, more or less. Although Frankfurter joined Harlan's opinion arguing that exclusion should not occur in this case, the thrust of Harlan's argument was that exclusion should not be forced on the states, not that exclusion under the Due Process Clause would not be appropriate on the facts of *Mapp*.

354. The nature of the intrusion is obviously an important variable in this analysis. But so is the nature of the government's interest. The type of search conducted in *Mapp* might not be flagrant if a murder were being investigated. The other police methods described here might usually result in exclusion or dismissal of charges regardless of the suspected crime, but perhaps in certain cases, involving particularly serious crimes (e.g., terrorism), such actions would not be viewed as disproportionate.

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

356. See *United States v. Calandra*, 414 U.S. 338, 348 (1974) ("[T]he rule is 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."); see also Schrock & Welsh, *supra* note 2, at 369.

fined to include flagrant violations of Fourth Amendment rights. Beyond this, however, the personal right to exclude illegally seized evidence does not go.³⁵⁷

If those conclusions stand, further expansion of the exclusionary rule can only be justified if it effectively implements the Fourth Amendment, a provision which protects the right "of the *people*" to be secure,³⁵⁸ not just the right of a particular criminal defendant. Part II has already described the relatively meager benefits of the exclusionary rule compared to various alternative remedies. After summarizing that discussion, the concluding part of this article looks at the relative costs of the rule and its competitors, and once again concludes that, at best, the rule ends up in second place.

IV. OF COSTS AND BENEFITS: CONCLUDING THOUGHTS

The exclusionary rule has become a venerated symbol of the liberal agenda. It is time to take it off its pedestal. A careful examination of its impact on the police and its constitutional underpinnings suggests that it is a fraud. It is not an effective way of preventing police misconduct, nor is it mandated by the Constitution except in a narrow subset of cases.

As part II demonstrated, if optimal deterrence of illegal searches and seizures is the goal, the exclusionary rule is a poor solution. Changing or suppressing behavior is a complex and difficult task. It is especially difficult when, as is true with many types of illegal searches and seizures, the behavior is implicitly or explicitly endorsed by peers, superiors, and a large segment of the general public. Without a strong disincentive to engage in such conduct, it will continue. Thus, a regime that directly sanctions officers and their departments is preferable to the rule. Although there are many versions of such a regime, it should have several core components: (1) a liquidated damages/penalty for all unconstitutional actions, preferably based on the average officer's salary; (2) personal liability, at the liquidated damages sum, of officers who knowingly or recklessly violate the Fourth Amendment; (3) entity liability, at the liquidated damages sum, for all other violations; (4) state-paid legal assistance for those with Fourth Amendment claims; and (5) a judicial decisionmaker.

That such a regime is a better deterrent than the rule does not establish that it should be adopted, of course. The exclusionary rule clearly does have some deterrent effect. If it proves to be considerably

357. Indeed, it can be argued that the due process right is likewise not a "personal" right, because, as Schrock and Welsh point out, *see supra* text accompanying note 329, suppression for the purpose of assuaging the judicial conscience and public outrage is using the defendant for societal ends.

358. *See Amar, supra* note 3, at 813 n.206.

less costly than a damages regime, perhaps it should remain the sanction of choice.

It is unlikely that the rule is *significantly* “cheaper,” however, whether one looks at financial or other types of costs. To many, the primary “cost” of the exclusionary rule is the number of criminals who escape conviction because evidence against them has been suppressed. A conservative estimate is that approximately 10,000 felons and 55,000 misdemeanants evade punishment each year because of successful Fourth Amendment suppression motions.³⁵⁹ Other costs of the rule are more subtle. These include the threat to the Fourth Amendment posed by judges and prosecutors concerned with freeing criminals,³⁶⁰ the psychic and systemic costs of routine perjury by police officers,³⁶¹ the distracting impact of suppression hearings on the quality of defense representation on other issues,³⁶² and the damage to courts and government generally because of public outrage at the huge benefit criminals receive when the cases against them are dismissed or damaged by exclusion.³⁶³

All of these costs would be reduced or eliminated under the proposed damages scheme. Looking at the last four costs first, the latter two would obviously disappear under a damages regime, and I have argued that the first two (the dilution-of-Fourth Amendment and perjury harms) would likewise be minimized under such a regime.³⁶⁴ The effect of the damages alternative on conviction rates is less clear. The possibility that liability concerns will induce police to refuse to investigate crimes when they have legitimate suspicion or lead departments to abort the opportunity to do so should be minimal, for reasons I have suggested.³⁶⁵ That still leaves the possibility that the 65,000 cases

359. 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, 669-70. For various other estimates of this type of cost, expressed in percentage terms ranging from 0.5% (of all felony arrests) to 7.1% (of all felony drug arrests), see *Leon v. United States*, 468 U.S. 897, 998 n.6 (1984).

360. The effect on judges is described *supra* note 42 and text accompanying *supra* notes 173-79. As to the effect on prosecutors, see Barnett, *supra* note 3, at 967 (asserting that, because of the rule, “[i]nstead of prosecuting the police for their illegal conduct, the prosecutor’s office becomes an insidious and publicly subsidized source of political and legal agitation in defense of illegal conduct. Refusal to consider the long run effect of this phenomenon on the stability of constitutional protections would be dangerous and unrealistic”).

361. See Slobogin, *supra* note 40, at 1039 (police lying “diminishes one of our most crucial ‘social goods’—trust in government . . . [T]he loss of police credibility on the stand diminishes law enforcement’s effectiveness in the streets. . . [T]o the extent other actors, such as prosecutors and judges, are perceived to be ignoring or condoning police perjury, the loss of public trust may extend beyond law enforcement to the criminal justice system generally”).

362. Stuntz has argued that a major negative effect of the criminal procedure revolution has been the extent to which procedural issues have distracted defense attorneys from guilt-innocence issues. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31-45 (1997). If he is right, relieving defense attorneys of suppression duties should improve the overall quality of representation.

363. See *supra* note 330.

364. See *supra* text accompanying notes 95-96 & 173-79.

365. See *supra* text accompanying notes 183-222.

that are currently ended by suppression, as well as some proportion of those cases that currently do not result in a motion to suppress, would never even be initiated under a regime that deters police from engaging in the necessary searches and seizures.

In this regard, a favorite liberal argument on behalf of the rule has been to quote the statement from John Kaplan (himself a "conservative" on this issue) that the only difference between the exclusionary rule and an effective alternative is that the former "flaunts before us the costs we must pay for fourth amendment guarantees."³⁶⁶ Put another way, the contention is that any alternative that truly works will result in at least as many lost convictions as the rule. A first response to this argument is that if we can avoid flaunting the costs of the Fourth Amendment and still achieve its goals, so much the better. More importantly, the assumption that an effective alternative prevents us from catching any criminal the exclusionary rule prevents us from convicting is wrong. The point of an *effective* deterrent is not only to discourage unconstitutional actions but to encourage constitutional ones. With an effective deterrent in place, police who lack probable cause will not necessarily give up; the more reasonable assumption is that they will simply get more cause. That is precisely the behavior a damages regime would systematically induce and what the exclusionary rule fails to encourage in any concerted way.

Other costs of the competing regimes are more prosaic, but at least as important.³⁶⁷ There is no doubt that the proposed system would be expensive; if it is "liberal" in no other way, it at least fits the paradigm of a costly government program. Attorneys for both sides would have to be paid and a special bench would have to be created. Police departments would be accountable for damages and would incur costs in improving training programs and increasing job qualification requirements. Departments might also have to spend more on salaries, if fear of liability drives some applicants away. At the same time, suppression hearings should be rare events, which will result in considerable savings,³⁶⁸ and retrials of defendants who successfully appeal convictions on Fourth Amendment grounds should virtually disappear. Many of the costs would simply be transferred from one system to the other. For instance, public defenders and suppression hearing judges might well become agency lawyers and fact finders in

366. Kaplan, *supra* note 330, at 1037; *see also* Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 47 n.211 (1987) (citing Kaplan); Maclin, *supra* note 2, at 56 (same).

367. Cf. Paul R. Verkuil, *On Making Government Pay*, 83 COLUM. L. REV. 1582, 1584-86, 1590 (1983) (reviewing SCHUCK, *supra* note 104, and taking Schuck to task for not considering the costs of his proposal to adopt a respondeat superior regime).

368. In Chicago, 34% of court time is spent on hearing motions to suppress. *See* OFFICE OF LEGAL POLICY, *supra* note 82, at 615. According to another study, 32.6% of all federal criminal defendants who go to trial file Fourth Amendment suppression motions, nearly all of which are decided in formal hearings. *See* REPORT BY THE COMPTROLLER, *supra* note 6, at 10.

damages actions. Police officers who once testified in suppression hearings would now testify in damages proceedings. Costs to police departments will be more difficult to defray but, if the premise of the proposal is correct, expenditures on training and hiring should significantly reduce damages payouts.

Assuming that the costs of the proposed regime are not prohibitive and that its deterrent benefits outweigh those of the exclusionary rule, the instrumental argument for the rule collapses. If the rule is to survive, it must be as a personal right conferred by the Constitution. As part III demonstrated, however, the most the Constitution requires is exclusion in cases of flagrant violations and seizure of private papers. Thus, even the rule as it exists today, much less the rule in its most liberal form, cannot be sustained. The upshot of these observations is that a damages alternative like the one proposed should be adopted, with a mere vestige of the rule, at most, attached.

One last question remains: is such a regime politically feasible? A few proponents of the exclusionary rule have argued that we must keep the rule because a polity obsessed with crime control would never adopt an effective alternative.³⁶⁹ That argument—which in effect says that we should not bother pushing for anything better because we will fail—is too fatalistic for a true liberal.³⁷⁰ It also comes perilously close to the very unliberal contention that the rule is preferable because it does not fully enforce the Fourth Amendment.³⁷¹

Further, the political unfeasibility argument minimizes the proposal's strong selling points, points that should appease even many conservatives. First and foremost, the proposal should bring more

369. See Dripps, *supra* note 2, at 629-30; Maclin, *supra* note 2, at 49; Steiker, *supra* note 2, at 849-50. To the argument that the current political climate is antagonistic to change is often added the (accurate) observation that no meaningful remedies developed before *Mapp*; similarly, the contention goes, nothing will happen now. See Maclin, *supra* note 2, at 60. But, of course, outside of the coerced confession context, there were virtually no remedies for *any* constitutional criminal rights prior to the 1960s. Governments simply did not focus on the issue until the Warren Court made them. Now, however, *Mapp* has gotten people used to thinking there should be a remedy for the Fourth Amendment. And now, unlike at the time of *Mapp*, a legislative reformer can claim that all that is being proposed is replacement of an old remedy for a new, better one.

370. Cf. Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2302-03 (1998) ("It is wrong to criticize . . . proposals that are not currently politically feasible. Good legal scholarship can sometimes *change* what is politically feasible.").

371. Given the overt and covert support for illegal searches and seizures mentioned above, perhaps our society does not *want* full enforcement of the Fourth Amendment. But *liberals* should want full enforcement, not just because the Fourth Amendment is a constitutional principle, but because ignoring its limitations undermines the democratic state, could lead to major upheaval, or both. Cf. Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police, in POLICE POWER AND INDIVIDUAL FREEDOM* 87, 97 (Claude R. Sowle ed., 1962) ("All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental right without which there can be no liberty."); Schwartz, *supra* note 214, at 360 ("There exists a seething resentment of police practices . . . in minority communities.").

effective protection of *everyone's* Fourth Amendment interests,³⁷² through greater police adherence to the law,³⁷³ simplification of that law,³⁷⁴ invigorated judicial review,³⁷⁵ improved hiring, training, and supervision of officers,³⁷⁶ and the increased use of warrants.³⁷⁷ It should also reduce racial tensions,³⁷⁸ cut down on useless investigations of low-level victimless crime,³⁷⁹ promote innovative, problem-solving police work,³⁸⁰ and encourage stronger departmental reactions to rogue officers who ultimately cost the system money and respect.³⁸¹ And, most importantly for the would-be lobbyist, the proposal would virtually rid us of that great liberal demon, the exclusionary rule.

For the latter reason, many people may label this whole effort the work of a right-winger. My hope is that the careful reader thinks otherwise. Even if the reader is just unsure, this article has done its work.

372. That conservatives support this proposition just as strongly as liberals is suggested by research indicating that ratings of intrusiveness of search and seizures did not vary significantly with the person's score on a Due Process-Crime Control Scale. *See* Slobogin & Schumacher, *supra* note 41, at 772-74.

373. *See supra* text accompanying notes 79-110.

374. *See supra* text accompanying notes 180-81.

375. *See supra* text accompanying notes 162-79.

376. *See supra* text accompanying notes 122-61.

377. *See supra* text accompanying notes 198-201.

378. *See supra* text accompanying notes 212-16.

379. *See supra* text accompanying notes 195-97.

380. *See supra* text accompanying notes 217-21.

381. *See supra* note 203.