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The Exclusionary Rule: Is It on Its Way Out? Should It Be?

Christopher Slobogin*

This symposium, comprising six articles in addition to this one, was triggered by a spate of Supreme Court opinions occurring over the last seven years, all of which raise the two questions in the title to this article (which is also the title of the symposium). Since 1974, when *United States v. Calandra*¹ definitively established deterrence as the primary objective of the suppression remedy, the Court has nibbled away at the exclusionary rule from a number of different directions.² But the Court's decisions in *Hudson v. Michigan* (2006),³ *Herring v. United States* (2009),⁴ and *Davis v. United States* (2011)⁵ reveal a Court that is now willing to take much larger bites out of the rule, and perhaps even swallow it whole.

Justice Scalia began the feast in his majority opinion in *Hudson*, which held that the suppression remedy does not apply to violation of the Fourth Amendment's knock-and-announce rule.⁶ In rebutting Hudson's argument that exclusion was a crucial means of ensuring police adherence to that rule, Justice Scalia stated, "We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."⁷ He pointed out that, since *Mapp v. Ohio*⁸ first applied the exclusionary rule to the states, statutes and caselaw have facilitated civil suits both for Fourth Amendment violations and for failure to train officers about the Fourth Amendment, and that Congress has now authorized attorneys' fees as a means of encouraging such suits even in cases involving minimal damages.⁹ An additional reason to reconsider the exclusionary remedy, Scalia asserted, is "the increasing professionalism of police forces, including a new emphasis on internal discipline," which is often combined with improved training programs designed "to teach

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¹ *United States v. Calandra*, 414 U.S. 338 (1974).

² *Id.* at 347 ("the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."). Of course, there were forerunners of *Calandra*, including *Mapp* itself. See *infra* text accompanying notes 46–48.

³ *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁴ *Herring v. United States*, 555 U.S. 135 (2009).

⁵ *Davis v. United States*, 131 S. Ct. 2419 (2011).

⁶ *Hudson*, 547 U.S. at 599.

⁷ *Id.* at 597.

⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹ *Hudson*, 547 U.S. at 597–98.

officers and their supervisors what is required of them under this Court's cases."¹⁰ Perhaps most chilling to proponents of the rule, however, was Justice Scalia's observation that even if none of these devices is in fact an effective deterrent, the Court has considered them sufficient remedies for other types of police violations, such as police abuse and denial of the Sixth Amendment right to counsel after the suspect has already lawfully confessed.¹¹ "Many would regard these violated rights as more significant than the right not to be intruded upon," Justice Scalia opined, "and yet nothing but 'ineffective' civil suit is available as a deterrent."¹²

At least these last ruminations could be written off as fanciful dicta. In *Herring*, the Court got more specific, in an opinion refusing to suppress evidence obtained during a search incident to an arrest based on an unconstitutionally stale warrant.¹³ The Court has long recognized that exclusion is less likely to be required when the police are acting in "objectively reasonable reliance" on a warrant or similar outside authority and thus are less likely to be deterred by the prospect of losing evidence they find.¹⁴ But in *Herring*, Chief Justice Roberts appeared to reach well beyond those situations when he stated that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct."¹⁵ Thus, he reasoned, while "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," it is not meant to deter simply negligent conduct in individual cases.¹⁶ This language suggests that Roberts, and perhaps the four justices who joined in his opinion, are ready to extend the good faith exception to warrantless searches and seizures.¹⁷

That possibility came closer to fruition in *Davis*, where the Court held that evidence obtained during a warrantless search in good faith reliance on existing Fourth Amendment law is not subject to exclusion even if the suspect has a persuasive argument that the rule should be changed in his favor.¹⁸ In response to the argument that this holding would discourage challenges to Fourth Amendment law by litigants who would gain nothing from winning, Justice Alito's majority opinion, which at least six justices joined, stated that the exclusionary rule is only

¹⁰ *Id.* at 598–99.

¹¹ *Id.* at 597–98.

¹² *Id.* at 597.

¹³ *Herring v. United States*, 555 U.S. 135, 147–48 (2009).

¹⁴ *See infra* note 54.

¹⁵ 555 U.S. at 143.

¹⁶ *Id.* at 144.

¹⁷ The language also suggests that even if application of the rule would deter in a given situation, its imposition should be limited by the officer's blameworthiness. *See, e.g., United States v. Davis*, 690 F.3d 226, 256 n.34 (2012) (police extraction of DNA profile from clothing of person for whom they did not have probable cause was not "culpable" because there was no evidence of systemic violations, and therefore exclusion should not occur).

¹⁸ *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011).

meant to deter misconduct, not “facilitat[e] the overruling of precedent.”¹⁹ While Justice Alito went on to describe ways in which Fourth Amendment doctrine might still be challenged despite the ruling in *Davis*,²⁰ his resistance to the idea that the rule is a mechanism for fine-tuning the law demonstrates the dominance of the deterrence rationale. As Justice Scalia stated in *Hudson* for a majority of the Court, exclusion appears to be the Court’s “last resort” not its “first impulse.”²¹

On its face, none of this signals that the Court will abandon the exclusionary rule entirely. The suppression remedy has been thought to be in grave danger before, but it has managed to survive.²² Nonetheless, a number of commentators suspect that this latest line of decisions finally signals the beginning of the end for the rule.²³ Many of the authors in this symposium agree. And all of them take a position on whether, if the rule were abolished or more significantly undermined, that development would be a good thing. In the course of doing so, all six articles manage to say something new and provocative, despite the vast amount of literature on the exclusionary rule that already exists.²⁴ This brief introduction to the symposium sets up their discussion of both of the questions posed by the symposium’s title, and ends with a few observations from a comparative perspective.

I. IS THE RULE ON THE WAY OUT?: A VERY SHORT HISTORY

Even in colonial days courts may have, in rare instances, excluded illegally seized evidence.²⁵ During the next century, a few state courts began to routinely dismiss cases because of illegal searches.²⁶ But the first Supreme Court case to require exclusion did not come until 1886, over a century after the Constitution

¹⁹ *Id.* at 2432.

²⁰ *Id.* at 2433.

²¹ *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

²² See, e.g., Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1985 (2008) (stating that the Court’s adoption of the inevitable discovery exception to the rule in 1984 unleashed “a virus capable of killing” the rule).

²³ TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT EXCLUSIONARY RULE* 346 (2012) (“the current Court appears positioned to repeal the exclusionary rule altogether.”); Craig Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS., 211, 217 (Winter 2010) (stating that a majority of the Court has decided “that the exclusionary rule must be reconsidered.”).

²⁴ Professor Taslitz reports that, based on his Westlaw search, almost 400 articles have focused on the rule. Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 422 n.14 (2013).

²⁵ See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 14–20 (2009-10).

²⁶ Wesley Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 442, 504 (2010) (“In several state courts, including New York, courts in the mid-nineteenth century began excluding alcohol discovered with defective warrants [and as] police searches grew much more frequent” exclusion spread to other types of cases).

was ratified. In *Boyd v. United States*,²⁷ the Court held that use at trial of private papers obtained from the accused through a subpoena ordering their production violated the Fifth Amendment's prohibition against compelled testimony and thus was also unreasonable under the Fourth Amendment.²⁸ Three decades later, in *Weeks v. United States*,²⁹ the Court untethered exclusion from the Fifth Amendment, stating simply that the government must return (prior to adjudication) any illegally seized property over which the accused has a superior property interest.³⁰

While *Boyd* and *Weeks* established an exclusionary principle, neither decision's reasoning, taken literally, provided a remedy for the typical target of an illegal search and seizure. Since *Boyd* only applied to seizure of "testimonial" evidence such as documents (given the language of the Fifth Amendment³¹) and since *Weeks* only applied to property legitimately owned by the accused, exclusion did not occur under these cases if the illegally seized evidence was contraband or non-testimonial fruit of crime.³² Furthermore, because at the time these cases were decided the Fourth and Fifth Amendments were thought to apply solely to the federal government, *Boyd* and *Weeks* only affected federal prosecutions, not state cases, where the lion's share of crimes are adjudicated.³³

The first obstacle to exclusion was fairly quickly removed in *Silverthorne Lumber Co. v. United States*.³⁴ There Justice Holmes asserted that, without the exclusionary remedy, the Fourth Amendment would be "a form of words," language that strongly suggested that suppression of illegally seized evidence is

²⁷ *Boyd v. United States*, 116 U.S. 616 (1886).

²⁸ *Id.* at 633 ("the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment").

²⁹ 232 U.S. 383 (1914).

³⁰ *Id.* at 396 (previous caselaw admitting illegally obtained evidence "affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment").

³¹ U.S. CONST. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").

³² *Cf. Gouled v. United States*, 255 U.S. 298, 309 (1921) (stating the "when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken," a warrant-based search is permissible).

³³ *See Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) (7-1 decision) ("We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure.").

³⁴ 251 U.S. 385 (1920).

constitutionally required regardless of its nature.³⁵ Other cases decided in the 1920s reinforced that position.³⁶ By 1928, Justice Brandeis felt able to declare that “the government itself would become a lawbreaker” unless *all* illegally seized evidence were excluded.³⁷

The second obstacle to exclusion took longer to overcome. Despite the high-sounding language of Justices Holmes and Brandeis suggesting that the exclusionary rule was a fundamental right guaranteed by the Fourteenth Amendment’s due process clause, the Court resisted applying the rule to state cases for almost half a century after *Weeks*, except when the police action was so egregious that it “shocks the conscience.”³⁸ At the Supreme Court level, this perilous state of affairs was discovered only once, in *Rochin v. California*,³⁹ where police used a stomach pump to flush out drugs swallowed by a suspect.⁴⁰ In contrast, run-of-the-mill illegalities, the Court declared in *Wolf v. Colorado*,⁴¹ did not require exclusion as a constitutional matter, primarily because the rest of the world and most of the states had not adopted the rule, thus demonstrating that the exclusionary remedy was not thought to be “essential” to “ordered liberty.”⁴²

It was only after another seven states had decided exclusion was a necessary sanction for violation of Fourth Amendment rules that the Court reversed itself,⁴³ although its reason for doing so was not entirely clear. The Court’s decision in *Mapp v. Ohio*⁴⁴ initially echoed Holmes and Brandeis in stating that “the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.”⁴⁵ This language reinforcing the constitutional basis of the rule appeared to endorse the idea that the Fourth Amendment requires suppression of illegally seized evidence regardless of its effect on the police.

³⁵ *Silverthorne*, 251 U.S. at 392 (Holmes, J.) See also *id.* (“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”).

³⁶ See, e.g., *Agnello v. United States*, 269 U.S. 20 (1925) (excluding contraband cocaine); *Amos v. United States*, 255 U.S. 313 (1921) (excluding contraband liquor).

³⁷ *Olmstead v. United States*, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting). See also *id.* at 470 (Holmes, J., dissenting) (“We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”).

³⁸ *Rochin v. California*, 342 U.S. 165, 172 (1952).

³⁹ *Id.*

⁴⁰ *Id.* at 166.

⁴¹ 338 U.S. 25 (1949).

⁴² *Id.* at 27–29 (holding that the “core” of the Fourth Amendment is “implicit in the ‘concept of ordered liberty’” but that “[w]hen we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right” and noting that 30 out of 47 states rejected *Weeks*).

⁴³ See *Elkins v. United States*, 364 U.S. 206, 224–32 (Appendix) (1960) (app.).

⁴⁴ 367 U.S. 643 (1961).

⁴⁵ *Id.* at 649.

However, *Mapp* also discussed the efficacy of the rule. While “not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment,” the fact that, in the experience of a majority of states, other remedies for illegal searches and seizures had proven “worthless and futile” was important enough to be noted by the majority.⁴⁶ Later in the opinion, the Court cited *Elkins v. United States*⁴⁷ for the proposition that “the purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’”⁴⁸

In subsequent cases, this latter language, far from remaining “basically irrelevant,” became the focal point of the Court’s analysis. Twelve years after *Mapp*, the Court’s decision in *United States v. Calandra*⁴⁹ declared that “the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.”⁵⁰ By the time of *United States v. Leon*⁵¹ a majority of the Court was willing to respond to Justice Brandeis’ assertion that the rule is also meant to assure judicial clean hands with the statement “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.’”⁵²

Relying on the deterrence rationale, the Court has since significantly reduced the situations in which the rule applies in three contexts: (1) secondary process cases; (2) good faith cases; and (3) attenuated fruit cases. First, the Court has reasoned that when police know that illegally seized evidence will be excluded in the prosecution’s case-in-chief, any additional deterrence that might result from also preventing use of the evidence in civil proceedings, collateral criminal proceedings or to impeach a defendant at trial is minimal and does not justify suppression.⁵³ Second, as *Herring* and *Davis* illustrate, the Court has concluded that when the police reasonably rely on a third-party source such as a magistrate,

⁴⁶ *Id.* at 651–52.

⁴⁷ 364 U.S. 206 (1960).

⁴⁸ *Mapp*, 367 U.S. at 656 (quoting *Elkins*, 364 U.S. at 217).

⁴⁹ *See United States v. Calandra*, 414 U.S. 338 (1974).

⁵⁰ *Id.* at 347.

⁵¹ *United States v. Leon*, 468 U.S. 897 (1984).

⁵² *Id.* at 921 n.22.

⁵³ *See, e.g., Pennsylvania v. Scott*, 524 U.S. 357 (1998) (parole revocation proceedings); *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (civil deportation proceedings); *United States v. Havens*, 446 U.S. 620 (1980) (use for impeachment); *United States v. Janis*, 428 U.S. 433 (1976) (IRS proceedings); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings).

court clerk, or previous precedent, exclusion will provide little deterrent effect.⁵⁴ Finally, the Court has held that when the connection between evidence and the illegal search or seizure that led to its discovery is so attenuated that the illegality probably was not perpetrated in order to obtain the evidentiary fruit, the deterrent effect of the rule is unlikely to operate.⁵⁵

A perceived lack of deterrent effect is not the Court's only basis for creating exceptions to the exclusionary rule, however. The Court has also recognized at least three exceptions to the rule in situations where exclusion probably *would* deter, if it deters at all. First, exclusion is not permitted when the illegality did not infringe the defendant's own Fourth Amendment interests, even when the police who commit the violation know that this standing rule will prevent a challenge to their actions.⁵⁶ Second, if the government can show that illegally seized evidence would eventually have been discovered through legal means, exclusion is not necessary even if the police acted in bad faith, on the ground that suppression of evidence that inevitably would have found legally would put the police in a worse position than if the illegality had not occurred.⁵⁷ Third, exclusion is inapposite when it would not serve "the interest protected by the constitutional guarantee" even if the police intentionally violated the guarantee to secure evidence.⁵⁸ It is this latter exception that best explains *Hudson*, where the Court concluded that the knock-and-announce requirement is meant to protect against violence and property destruction, not illegal seizure of evidence.⁵⁹

⁵⁴ See also *Arizona v. Evans*, 514 U.S. 1 (1995) (reliance on court records); *Illinois v. Krull*, 480 U.S. 340 (1987) (reliance on statute); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (reliance on warrant); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (reliance on statute).

⁵⁵ As originally formulated, attenuation doctrine relied on much more than deterrence. See *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975). But its later manifestations are consistent with a deterrence rationale. See *United States v. Crews*, 445 U.S. 463, 475 (1980) (illegal arrest did not require exclusion of subsequent identification because police learned of victim and defendant's identity before the arrest); *United States v. Ceccolini*, 435 U.S. 268, 276 n.4 (1978) (illegal search did not require exclusion of witness discovered as a result of search in part because search not conducted "for the specific purpose of discovering potential witnesses").

⁵⁶ *United States v. Payner*, 447 U.S. 727, 735 (1980) (stating, in a case in which officers admitted conducting an illegal search knowing that the target would not have standing, that "our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices").

⁵⁷ *Nix v. Williams*, 467 U.S. 431, 445 (1984) (rejecting a bad faith limitation on the inevitable discovery doctrine).

⁵⁸ See, e.g., *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998) (indicating, in dictum, that even if destruction of property in the course of a search violates the Fourth Amendment, the fruit of the search is not necessarily inadmissible); *New York v. Harris*, 495 U.S. 14, 20 (1990) (refusing to suppress a statement taken at the stationhouse made after an illegal warrantless home arrest, on the ground that "suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal").

⁵⁹ *Hudson v. Michigan*, 547 U.S. 586, 593 (2006) ("The interests protected by the knock-and-announce requirement are quite different [from the warrant requirement]—and do not include the

These six exceptions have made the Fourth Amendment exclusionary rule a mockery of the original version established in the early twentieth century. It may be true, as Justice Kennedy insisted in *Hudson*, that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”⁶⁰ But the version of the rule that exists today is a far cry from the rule after *Silverthorne*, and at least five justices appear willing to increase that distance further.

All of the authors in this symposium believe the exclusionary rule is in trouble. But not all think it will expire soon. On the pessimistic side, Professor Taslitz thinks that “[t]he rule may [still] be one vote away from dying, but its current life force is unquestionably on the wane.”⁶¹ Professor Cloud states the Supreme Court’s rulings “have transmogrified the exclusionary remedy from a core element of Fourth Amendment rights into a nuisance.”⁶² Professor Myers concludes that “[t]he Supreme Court appears ready to accept a move away from mandatory exclusion in favor of a more graduated response, if there is an effective substitute. Or, possibly, without one.”⁶³ On the more optimistic side, Professor Sundby speaks of the rule’s “staying power,”⁶⁴ Professor Rosenthal also appears to believe the rule will not disappear in the near future,⁶⁵ and Professor Clancy, while stating that the rule is at its “nadir,” suggests that the current antipathy toward the suppression remedy may be temporary, especially in light of what is happening in state courts.⁶⁶

II. SHOULD THE RULE BE ON THE WAY OUT?

Although split about the rule’s future, all but one of the symposium authors believe the rule should continue to exist in its “mandatory” form, either because, as *Silverthorne* held, the Constitution requires it, or because it is the remedy that

shielding of potential evidence from the government’s eyes.”). Justice Scalia’s majority opinion also purportedly discussed a lack-of-deterrence rationale, but in fact his argument was simply that knock-and-announce violations are not worth deterring. *Id.* at 596 (“ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises.”).

⁶⁰ *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment).

⁶¹ Taslitz, *supra* note 24, at 420.

⁶² Morgan Cloud, *A Conservative House Divided: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 475, 476 (2013).

⁶³ Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 567, 574 (2013).

⁶⁴ Scott E. Sundby, *Everyman’s Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 394 (2013).

⁶⁵ Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 523, 566 (2013) (the exclusionary rule may be “the devil we know”).

⁶⁶ Thomas K. Clancy, *The Fourth Amendment Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 358 (2013).

comes closest to achieving optimal deterrence. Before describing these positions in more detail, I should note that my own view is different. Some years ago I argued that none of the theories that seek to ground the exclusionary rule in the Constitution hold water, except perhaps the idea that the due process clause bans egregious police misconduct, which would at most require a narrow version of the rule.⁶⁷ I also argued that the exclusionary rule is not very effective at curbing police misconduct, and that meaningful deterrence of illegality could be better achieved through a damages regime holding miscreant police personally liable (without indemnification) at a liquidated rate when they act in bad faith, and holding the department liable at the same rate when the police violation is negligent.⁶⁸ I asserted that this proposal:

should bring more effective protection of *everyone's* Fourth Amendment interests, through greater police adherence to the law [because police would be directly liable for bad faith actions], simplification of that law [through avoidance of nit-picky suppression motions], invigorated judicial review [by routinely bringing to the judiciary's attention illegal searches and seizures of innocent people], improved hiring, training, and supervision of officers [by departments wanting to reduce costly negligent illegalities], and the increased use of warrants [by police wanting to immunize themselves from liability]. It should also reduce racial tensions [through discouraging street harassment by police worried about personal liability], cut down on useless investigations of low-level victimless crime [ditto], promote innovative, problem-solving police work [that avoids searches and seizures], and encourage stronger departmental reactions to rogue officers who ultimately cost the system money and respect.⁶⁹

This is a lot to defend and it took me over 80 pages to do so. I will not rehearse the supporting arguments any further here, but rather refer the reader to those pages.

In contrast, four of the six authors in this symposium subscribe to the “majestic conception” of the exclusionary rule—the idea that the rule does have a constitutional basis and that deterrence is not the primary goal of the rule.⁷⁰ Each of these authors takes a slightly different slant on the issue. After detailing the Court's recent exclusionary rule cases and state court decisions that diverge from those cases, Professor Clancy says the rule has to be “part of the constitutional

⁶⁷ Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 425 (1999).

⁶⁸ *Id.* at 387–389.

⁶⁹ *Id.* at 445–46.

⁷⁰ The “majestic conception” phrase comes from Justice Stevens dissenting opinion in *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting).

right” because, as the Supreme Court stated in *Marbury v. Madison*,⁷¹ “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁷² Professor Sundby elaborates on this theme by arguing that suppression of illegally seized evidence is a manifestation of this country’s allegiance to the rule of law, an allegiance that law-and-order types should share.⁷³ To Sundby, the rule ensures “the ability of ordinary citizens to invoke the law on their behalf in everyday courts.”⁷⁴ Professor Taslitz provides a robust defense of the rule-as-judicial-integrity argument, contending that, given the inefficacy of alternatives to the rule, its abandonment would be rank judicial hypocrisy.⁷⁵ The rule is needed, he asserts, to ensure “(1) a wholeness among judicial words, motivations, and deeds; (2) judicial accountability for these things; (3) the parties’ perception of fair procedures, especially the opportunity for effective voice (voice that might make a real difference) about constitutional claims; and (4) the informed public’s perception that the courts’ actions are legitimate *because* they reflect the preceding three conditions, not necessarily because the public agrees with any particular court decision.”⁷⁶ Finally, Professor Cloud suggests that the reason the rule is in decline is not only because of changing ideological preferences on the Court but because of a penchant, even among “liberal” justices, for pragmatic thinking.⁷⁷ To Professor Cloud, the Court’s approach to both the rule and the Fourth Amendment jurisprudence it implements has “replaced primary rules that limited the authority of government agents with a hopelessly vague formula lacking substantive legal content.”⁷⁸ He argues in favor of what he perceives to be more traditional analysis that relies on implementing foundational rights (in particular property rights) that are not susceptible to balancing.⁷⁹

Professors Rosenthal and Myers are not as convinced of the exclusionary rule’s constitutional bona fides and instead focus on its efficacy at enforcing the Fourth Amendment. Professor Rosenthal takes as a given that, in light of the language of the Fourth Amendment and contemporary doctrine, exclusion is not constitutionally required, and he rebuts several arguments to the contrary.⁸⁰ Professor Myers “assumes that the Court remains committed to the view that the exclusionary rule is mandated only so long as it is the only tool the courts have to

⁷¹ 5 U.S. 137 (1803).

⁷² Clancy, *supra* note 66, at 390 (quoting *Marbury*, 5 U.S. at 163).

⁷³ Sundby, *supra* note 64, at 398–99.

⁷⁴ *Id.* at 398.

⁷⁵ Taslitz, *supra* note 24, at 423.

⁷⁶ *Id.*

⁷⁷ Cloud, *supra* note 62, at 506–07.

⁷⁸ *Id.* at 492.

⁷⁹ *See id.* at 521.

⁸⁰ Rosenthal, *supra* note 65, at 523–30.

encourage law enforcement to follow the Fourth Amendment.”⁸¹ While both authors thus believe that deterrence should be the rule’s goal, they differ in their conclusions about whether it achieves that objective. Professor Rosenthal provides a closely reasoned account of why other remedies, and damages in particular, either cannot accomplish as much deterrence as exclusion can or will over-deter legitimate police investigations.⁸² Professor Myers, in contrast, suggests an experiment with “small-claims courts” that would, similar to my proposal, allow judges to fine offending officers while reserving exclusion for bad faith illegalities.⁸³

These articles left me still wondering about both the majestic conception of the rule and its efficacy as a deterrent. For instance, one might well ask why a damages proceeding in open court against the offending police officer and the department does not satisfy the remedial, rule-of-law and judicial-integrity concerns of Clancy, Sundby, and Taslitz. While these authors appear to believe that a viable damages action simply isn’t feasible in today’s climate,⁸⁴ the rule’s existence has given governments little reason to try to fashion such a regime. Furthermore, as Professor Myers points out,⁸⁵ whatever it might do for Fourth Amendment law, exclusion clearly undermines the remedial, rule-affirmation and legitimizing aspects of the *substantive* criminal law, not only because it blatantly allows guilty people to go free, but because even in those cases that can proceed without the excluded evidence, the resulting plea bargains and trials do not reflect the known facts. That may be why exclusion is so unlikely to occur in serious cases.⁸⁶

It is also interesting to note that most of the decisions in which the lower courts and the Supreme Court developed the majestic conception of the exclusionary rule involved bootlegging and gambling, where dismissal of the charges was fairly easy to countenance.⁸⁷ In contrast, *Mapp* ensured that the Court

⁸¹ Myers, *supra* note 63, at 568.

⁸² Rosenthal, *supra* note 64, at 537–66.

⁸³ Myers, *supra* at 570.

⁸⁴ See, e.g., Taslitz, *supra* note 24, at 425–30 (giving reasons why damages actions aren’t effective remedies). *But see* Myers, *supra* note 63, at 595 (suggesting why his damages proposal would be palatable politically).

⁸⁵ Myers, *supra* note 63, at 581 (exclusion means that “the courts have to spend their legitimacy as a truth-finding institution to purchase police compliance”).

⁸⁶ See Peter Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, U. ILL. L. REV. 223, 234–35 (finding that over 80% of cases dismissed because of the rule involved minor crimes such as possession of small amounts of marijuana or cocaine, obscenity, or petty larceny and that “the vast majority [of suspects] would never have been given detention time” had they been convicted).

⁸⁷ Consider the crimes involved in the Court’s seminal exclusionary rule cases prior to and including *Mapp*: *Boyd v. United States*, 116 U.S. 616 (1886) (customs violation); *Weeks v. United States*, 232 U.S. 383 (1914) (violation of lottery law); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (conspiracy to defraud the government); *Amos v. United States*, 255 U.S. 313 (1921) (liquor law violation); *Agnello v. United States*, 269 U.S. 20 (1925) (cocaine possessed in violation of a tax law); and *Mapp v. Ohio*, 367 U.S. 643 (1961) (illegal gambling). See also Oliver, *supra* note

would get a steady diet of cases involving the types of crimes routinely litigated in state courts, like murder, robbery and burglary,⁸⁸ cases that had to be decided under Fourth Amendment rules largely originating in the daintier Prohibition-era environment.⁸⁹ It would not be surprising if this development influenced the Court's movement away from the majestic rationale for exclusion. In fact, even before Chief Justice Burger took office and the ideological balance on the Court shifted, its members were backtracking on the rule. In *Linkletter v. Walker*,⁹⁰ seven members of the Court refused to apply the rule retroactively after balancing the low deterrent value of such a holding against the number of people it might release (including Linkletter, a burglar),⁹¹ and in *Alderman v. United States*,⁹² six out of the eight deliberating members of the Court refused to adopt the defendant-friendly target standing rule in a case involving individuals charged with "murderous threats."⁹³ In other words, most Warren Court justices became "pragmatists" in Fourth Amendment cases, in my view understandably so, once the real costs of exclusion became apparent.

The deterrence rationale for the exclusionary rule is also subject to endless debate.⁹⁴ If the rule were a good deterrent, one would expect search and seizure practices to generate more evidence than the six to ten percent hit rate routinely

26, at 494–507 (describing how the exclusionary rule in the 19th and 20th centuries developed in cases involving illegal searches for liquor and explaining that once New York repealed its prohibition law Benjamin Cardozo, then a judge on the New York Court of Appeals, famously found it easier to reject the rule that the "the criminal should go free because the constable has blundered") (quoting *People v. Defore*, 150 N.E. 585, 587 (1926)).

⁸⁸ Many of the key cases adopting exceptions to the rule originated in the states and involved serious crimes. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (holding, in a California murder case, that the rule does not apply to state cases in federal habeas proceedings); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (concluding, in a Massachusetts murder case, that the good faith exception applies to violations of the Particularity Clause); *Nix v. Williams*, 467 U.S. 431 (1984) (adopting, in a Iowa murder case, the inevitable discovery doctrine).

⁸⁹ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 200-01 (2011) (arguing that most Fourth Amendment jurisprudence developed in low-stakes Prohibition cases and thus were "poor proxies" for regulating police tactics used in investigation of violent felonies and felony thefts).

⁹⁰ 381 U.S. 618 (1965).

⁹¹ *Id.* at 637 (stating that, since evidence seized through a search may have been destroyed and that witnesses may have disappeared or have diminished memory, making retroactive the "extraordinary procedural weapon" of exclusion, one "that has no bearing on guilt," "would seriously disrupt the administration of justice"). Justice Clark, the author of *Mapp*, also wrote the majority opinion in *Linkletter*.

⁹² 394 U.S. 165 (1969).

⁹³ *Id.* at 174 (holding that Fourth Amendment rights "may not be vicariously asserted").

⁹⁴ For a recent treatment concluding, similar to my earlier arguments, that the rule does little to discourage police harassment and decreases the benefit of the doubt accorded to defendants likely to be innocent, see Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011).

reported in New York City for frisks⁹⁵ (a rate possibly no better than chance⁹⁶), or the 10 to 35% hit rate for “probable cause” searches of cars reported in Maryland and San Antonio, respectively.⁹⁷ The much-higher success rate reported for searches of homes may well be the result of the warrant requirement, not the exclusionary rule.⁹⁸ Professor Rosenthal is right to question whether a damages action would be a better deterrent, and whether, even with a good faith exception for individual liability, it might over-deter.⁹⁹ But since no jurisdiction has developed a meaningful damages remedy, the jury is still out on that issue as well, just as it is with respect to the majestic conception rationale.

III. A COMPARATIVIST PERSPECTIVE

Perhaps we can learn something from other countries on both these points. Only Professor Sundby among the symposium authors more than briefly mentions the role of exclusion outside of the United States.¹⁰⁰ Although exceptions exist,¹⁰¹ most countries do not favor suppression of evidence as a remedy for an illegal search or seizure. Of greatest interest here is the fact that most countries in Europe and the former British Commonwealth rarely exclude illegally seized evidence and, when they do, it is usually only in cases where the police acted egregiously.¹⁰² This observation suggests several questions, briefly stated here.

⁹⁵ GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES xi, xv, 39, 43 (2007) (finding that 6 to 10% of over 500,000 stops resulted in arrests, mostly for drug offenses).

⁹⁶ Cf. *City of Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000) (noting that 8.9% of the cars stopped randomly at a roadblock contained evidence of crime).

⁹⁷ Donald A. Dripps, *The New Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence”*, 37 FORDHAM URB. L.J. 733, 772 (2011) (describing and analyzing Maryland car search data); JOHN C. LAMBERTH, SAN ANTONIO RACIAL PROFILING DATA ANALYSIS STUDY, FINAL REPORT FOR THE SAN ANTONIO POLICE DEPARTMENT 48 tbl. 8 (2003) (showing hit rates for probable cause car searches of 34.9% for blacks and 40.1% for whites), available at [http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/San%20Antonio%20TX%20by%20Lamberth%20Consulting\[1\].pdf](http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/San%20Antonio%20TX%20by%20Lamberth%20Consulting[1].pdf).

⁹⁸ See, e.g., Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 249–50 (2000) (65% hit rate for warrant-based home searches).

⁹⁹ Rosenthal, *supra* note 65, at 560. I address these arguments in Slobogin, *supra* note 67, at 405–20.

¹⁰⁰ See Sundby, *supra* note 64, at 399–400 n.29.

¹⁰¹ *Id.* (describing in particular Ireland’s rejection of a good faith exception). Sundby does not mention that Ireland has also refused to follow America’s fruit of the poisonous tree doctrine. *Director of Public Prosecutions v. Cash*, 1 I.L.R.M. 389, paras. 41–42 (2010).

¹⁰² In Germany exclusion occurs only if the invasiveness of the action outweighs the importance of the evidence or the seriousness of the crime, in France it is triggered only in connection with a limited number of technical violations, and in Italy the rule is apparently also rarely observed. See CRIMINAL PROCEDURE: A WORLDWIDE STUDY 251–52 (Germany), 212 (France), 258 (Italy) (Craig Bradley ed., 2d ed. 2007). As for Commonwealth countries, in the United Kingdom

Are the criminal courts in these other nations less wedded to the rule of law, less prone to rely on “foundational” principles or perceived to be less legitimate than American courts, as the arguments of Professors Clancy, Sundby, Cloud and Taslitz suggest? If not, is that because suppression hearings aren’t publicizing police errors? Or is it because, in fact, exclusion isn’t necessary to achieve these majestic goals?

On the deterrence issue, are the police in these countries more likely to abuse their search and seizure powers? If not, is that because police in these other countries are intrinsically better behaved? Or is it because foreign governments have developed alternative sanctions or institutional structures that work as well or better than exclusion?

These hypotheses are worth studying.¹⁰³ A comparativist perspective also raises questions about the effect of the rule on the police and attorneys. Some comparativist scholars have speculated that the American adversarial system—an important element of which is the exclusionary rule—breeds law enforcement misbehavior by both prosecutors and police because of its win-at-all-costs mentality.¹⁰⁴ The exclusionary rule may also encourage excess on the other side. There is no doubt that the rule provides an incentive for defense attorneys to challenge not just obvious abuses but every police peccadillo.¹⁰⁵ Bill Stuntz even conjectured that Fourth Amendment and Fifth Amendment challenges, made tempting by the exclusionary remedy, distract defense attorneys from doing the harder work of proving innocence.¹⁰⁶

exclusion occurs only if the police illegality was egregious, *id.* at 163, and the same appears to be true in Australia. Frank Bates, *Improperly Obtained Evidence and Public Policy: An Australian Perspective*, 43 INT’L & COMP. L.Q. 379, 380 (1994). In Canada and New Zealand, the exclusionary rule has become more robust in recent years, but it still focuses on factors such as “the seriousness of the violation, . . . the impact of the illegal action on the defendant [and] the societal interest in the adjudication of the case.” William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 720–21 (2011). For the practice in Ireland, see *supra* note 101.

¹⁰³ I have laid out a research program in Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT’L L. & COM. REG. 321 (2011).

¹⁰⁴ See William T. Pizzi, *The American “Adversary System”?*, 100 W.VA. L. REV. 847, 849 (1998) (asserting that while continental police work for both sides, the alignment of the police and the prosecution in the United States is more likely “to produce police investigations that are biased, slanted, or even distorted to favor conviction.”); Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 523 n.109 (1975) (“One factor that explains differences in police behavior between continental and common law systems is the greater divergence in the latter between what the police actually know and what can be introduced as evidence at trial.”).

¹⁰⁵ See, e.g., *Florida v. Jimeno*, 500 U.S. 248 (1991) (in which the defendant argued that consent to search a car does not encompass consent to search a paper bag in the car); *Hicks v. Arizona*, 480 U.S. 321, 329 (1987) (holding that moving a stereo set to see its serial number without probable cause violates the Fourth Amendment); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (in which the defendant argued that the person who shared his duffel bag could not consent to a search of a pocket in the bag, an argument that the Court called “metaphysical”).

¹⁰⁶ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (“By giving defendants other, cheaper claims to raise,

Viewed from a comparativist perspective, the Fourth Amendment's mandatory exclusionary rule is another example of American exceptionalism, like the death penalty¹⁰⁷ and mass incarceration.¹⁰⁸ It is worth pondering whether the genesis of the rule is somehow related to these other practices, perhaps mediated through the hyper-adversarial attitudes the American system encourages.¹⁰⁹ This bigger picture is something to keep in mind when reading the scintillating essays in this symposium.

constitutional criminal procedure . . . raises the cost to defense counsel of investigating and litigating factual claims, claims that bear directly on their clients' innocence or guilt. The result is to steer defense counsel, . . . at the margin, away from those sorts of claims and toward constitutional issues.").

¹⁰⁷ David Johnson, *American Capital Punishment in Comparative Perspective*, 36 LAW & SOC. INQUIRY 1033, 1034 (2011) ("[A]ll other developed democracies except Japan have abandoned [the death penalty] or stopped executing").

¹⁰⁸ David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 28 (2011) ("Since the mid-1970s . . . the U.S. incarceration rate has skyrocketed, while those of most of our [Western] counterparts have either stayed relatively constant or increased at a much slower rate.").

¹⁰⁹ I develop this idea further in Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, in RESEARCH HANDBOOKS IN COMPARATIVE LAW: CRIMINAL LAW (Jacqueline Ross & Stephen Thaman, eds., forthcoming 2013), available at <http://ssrn.com/abstract=2247746>.

