THE CASE FOR THE CONTINGENT EXCLUSIONARY RULE

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I. INTRODUCTION

Few debates in American law are as sustained, or as bitter, as the debate over the exclusionary rule. Critics have attacked the exclusion of unconstitutionally obtained evidence for compromising the pursuit of truth in adjudication,[1] for exceeding the constitutional authority of the judiciary,[2] and for fostering police perjury and judicial hypocrisy.[3] Defenders have laid the blame for the "cost" of exclusion on the Fourth, Fifth, and Sixth Amendments that prohibit the acquisition of reliable evidence when complied with, rather than on the exclusionary rule which operates only when these substantive constitutional provisions are violated.[4] Exclusionary rule advocates have insisted on the constitutional necessity for *some* effective remedy for constitutional violations,[5] and maintain that exclusion offers a far more attractive remedy than reliance on damage actions undermined by valuation problems, immunity defenses, and inadequate legal representa-

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1. For the classic critique along these lines, see John Henry Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922).

2. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATT'Y GEN. ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, TRUTH IN CRIMINAL JUSTICE REP. NO. 2 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 573, 615-617 (1989) (arguing federal courts have no authority to impose exclusionary rule on states).

3. *See id.* at 613 ("Officers who learn that their searches were improper only after the fact are encouraged to lie about the circumstances under which the evidence was obtained, even to the point of perjuring themselves, to save the evidence.") (footnote omitted); *id.* at 614 ("Because judges are sensitive to the problem of allowing criminals to go free, they have an incentive to find that the basis for police action was sufficient.").

4. Senator Robert Wagner delivered the classic, if not the first, articulation of this argument:

> Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is only the sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

Record of the New York State Constitutional Convention, 559-60 (1938), *quoted in* Francis A. Allen, *The* Wolf *Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U. L. REV. 1, 19 n.56 (1950).

5. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting) ("The Amendment without the sanction is a dead letter."); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) (stating admissibility "reduces the Fourth Amendment to a form of words").

tion.[6] The Supreme Court seems to have adopted *both* positions, by continuing to suppress tainted evidence in the government's case-in-chief[7] while also recognizing a host of exceptions to the exclusionary rule. The most obvious of these are the standing doctrine,[8] the good-faith exception,[9] and the impeachment exception.[10]

The debate goes on because both tort remedies and the exclusionary rule have important advantages and serious drawbacks. Although appropriate reforms could overcome most of the defects with tort remedies, such reforms depend on appropriate legislation. Given the legislative incentives bearing on law-and-order issues, no legislature has yet delivered such reforms, nor is any likely to do so. Moreover, because constitutional violations ordinarily do not inflict the kind of material injury that our tort system compensates, tort schemes are plagued by the difficult problem of evaluating the plaintiffs' damages. Set too high and the damages would overdeter by inhibiting the police from vigorous action in cases near the border separating lawful from unlawful searches and seizures. Set too low and the damages would render the Fourth Amendment nugatory.

The exclusionary rule solves the political incentives problem because the Supreme Court imposed the rule as a matter of federal constitutional law. Exclusion also solves the valuation problem, because exclusion comes very close to setting the sanction equal to the government's illegal gain. Exclusion, however, suffers a serious psychological problem. Judges are reluctant to free obviously guilty criminals. Trial judges, therefore, tilt fact-finding against exclusion, while appellate judges give constitutional rights crabbed and grudging interpretations. As a result, it is fair to say that the Fourth Amendment is still underenforced.

This Article proposes a new conversation about constitutional remedies, a conversation about how exclusion and damages *might be combined* to provide an effective yet politically sustainable remedy for constitutional violations. The gist of the proposal is that courts should begin to experiment with suppression orders that are contingent on the failure of the police department to pay damages set by the court. The government, in this context, has no objection to receiving such an offer. If the government accepts the offer, it waives its objection to damages set by

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6. For the classic analysis of the weakness of tort remedies, see generally Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

7. *See* Arizona v. Hicks, 480 U.S. 321, 328 (1987) (holding police needed probable cause to move stereo equipment and check its serial numbers); Thompson v. Louisiana, 469 U.S. 17, 20-21 (1984) (suppressing evidence because police searched appellant's home without a warrant); Mincey v. Arizona, 437 U.S. 385, 391 (1978) (same).

8. *See* United States v. Payner, 447 U.S. 727, 731 (1980) (holding defendant lacked standing because the unlawful search and seizure violated only a third party's legitimate expectation of privacy).

9. *See* United States v. Leon, 468 U.S. 897, 913 (1984) (holding evidence should not be excluded if police reasonably relied on neutral magistrate's warrant, even if warrant is later found to be defective).

10. *See* United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding defendant's statements made in response to proper cross-examination are subject to impeachment, even if evidence in question was illegally obtained).

a judge without statutory authorization. If the government declines, it is in no worse position than if the judge had ordered suppression unconditionally.

The defendant might object on the ground that he has a constitutional right to the exclusion of the evidence. With respect to statements compelled in violation of the Fifth Amendment, or uncross-examined declarations admitted in violation of the Sixth Amendment confrontation clause, this claim is probably correct.[11] In other areas of criminal procedure doctrine, however, the courts exclude to deter future violations rather than to repair past violations. So long as the damages are set high enough to achieve deterrence comparable to that secured by exclusion, the defendant has no objection. Indeed, to the extent that constitutional remedies aim to compensate as well as to deter, damages that satisfy concerns for deterrence clearly compensate better than exclusion.

This proposed contingent suppression remedy has major advantages over the present system of self-contained suppression motions and self-contained damages actions. Compared to tort remedies, the contingent exclusionary rule solves the political problem because the federal courts would be setting the damages. Even conservative judges might jump at the chance to replace the despised exclusionary rule by imposing responsibility for loss of the conviction where it belongs–on departments that fail to train and discipline their officers to comply with constitutional standards. Because the government must waive its objection to the damages to avoid suppression, the courts could assess liquidated or punitive damages, cut through immunity defenses, and impose entity liability–all of the frequently urged, but never tried, prescriptions for effective damage actions.

As for the valuation problem, for deterrent purposes damages should be set equal to the expected governmental gain from the violation. Exclusion comes close to achieving this balance because, for the most part, evidence is gathered illegally to be used in prosecutions.[12] Contingent suppression remedies, thus, come with a built-in measure of adequate deterrence. If the government typically chooses to pay the damages, then damages are set too low. If the government typically chooses not to pay and forgo the evidence, then damages are set too high. Properly set, the damages should leave the government indifferent between exclusion and damages in the ordinary case, yet still free to pay the damages when the illegality turns up an exceptionally culpable or dangerous crime.

Compared to the current exclusionary rule, the contingent suppression remedy would encourage honest fact-finding and fair interpretations of the Constitution. Judges resist freeing patently guilty offenders, and are willing to credit police perjury at the trial court level and craft exceptions at the appellate level to prevent this result. A contingent suppression remedy, however, gives the suppression

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11. *See infra* notes 147-162 and accompanying text.

12. *See, e.g.*, WAYNE LAFAVE, 1 SEARCH AND SEIZURE § 1.2(b), at 31 (3d. ed. 1996) ("[A] significant amount of deterrence may be assumed from the fact that 'conviction of offenders remains obviously an important objective of police activity.'").

hearing judge a new option. She can reject improbable police testimony *without* freeing the guilty. The police department will be responsible for the escape of the guilty, for only on a refusal to pay damages set high enough to deter would the criminal go free.

On appeal, the same process would soon set to work. More generous interpretations of Fourth Amendment liberties would become more attractive. The Supreme Court might even reinvigorate the exclusionary rule itself, by cutting back on the exceptions to exclusion recognized under the balancing test. Viewed as the gateway to damages, rather than as a roadblock to prosecution, the exclusionary rule would seem far less draconian.

In a variety of other doctrinal contexts the Hobson's choice of no remedy or exclusion has distorted the substantive law. The failure to gather exculpatory evidence, suggestive identification procedures, and equal protection challenges to police arrest and search decisions all have faced the uphill struggle of persuading judges to release the apparently guilty. At present, for example, a suspect stopped and searched because of his race can raise an equal protection challenge only by demanding the suppression of the evidence. Naturally judges are reluctant to release guilty black defendants because equally guilty white suspects were not searched. These same judges might be eager to attack discriminatory enforcement–which when either real or perceived does so much to corrode public confidence in the administration of justice–by imposing damages on police departments whose officers invidiously target minority group members. If the damages are set high enough to deter, the new remedy would have enabled–at long last–a meaningful judicial response to such practices as stopping motorists for "driving while black."[13]

Whether even the federal courts could be counted on to set the damages high enough to provide a disincentive to unlawful police conduct comparable to the disincentive provided by the exclusionary rule seems to me the sixty-four dollar question. I, therefore, entertain serious doubts about this proposal. However, I am confident that the contingent suppression order offers an important new idea in constitutional criminal procedure remedies. I put the idea forward not as a finished policy proposal, but as a way to revitalize academic discourse about this important subject.

The supporting argument follows three steps. Part II briefly outlines the standard arguments in the exclusionary rule debate, and explains the psychological defects with exclusion and the valuation and political problems that attend damages actions. Part III explains how the contingent exclusionary rule would work, and sets out the legal argument supporting trial court authority to impose contingent

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13. On "driving while black," see Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, at 56, 59. For analysis of equal protection challenges to police investigative practices, see *infra* notes 177-192 and accompanying text.

suppression orders. This Part also explains how contingent suppression orders would improve upon the present regime of self-contained tort and suppression remedies. Part IV considers how the new remedy might prompt some improvements in the substantive law of criminal procedure, paying special attention to the Fourth Amendment, due process, and equal protection.

II. THE DEBATE OVER THE EXCLUSIONARY RULE

A. An Overview of the Debate

One of the most surprising features about the early exclusionary rule cases is the absence of judicial dissent from the basic proposition that unconstitutionally seized evidence should not be admissible against the search victim at trial. This is particularly surprising given that the theory of exclusion went through a serious metamorphosis between the announcement of the rule in the *Weeks* case[14] in 1914 and the end of the 1920s. By then, it was settled that corporations could invoke the Fourth Amendment exclusionary rule,[15] although corporations had (and have) no Fifth Amendment privilege against self-incrimination,[16] and that even contraband such as cocaine could be suppressed (although not returned) if illegally seized.[17] One might have supposed that justices who derived *Weeks* from the *Boyd* doctrine[18] forbidding use of private property to incriminate the owner might have dissented from these results, but such was not the case.

Still *Weeks* ignited a furious debate, in the law reviews and in the state courts, which were at that time free to follow or repudiate the *Weeks* doctrine. The preeminent evidence scholar John Henry Wigmore published a vitriolic critique of *Weeks* in 1922.[19] Wigmore argued that *Weeks* was wrong on principle, because a criminal prosecution should not be diverted by an inquiry into collateral matters such as the unlawful manner in which the parties may have come by their evidence. He also argued that the loss of evidence of crime was too high a price to pay for enforcing the Fourth Amendment:

> All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, a Court appears indifferent to what is the direct and immediate result, viz., of making Justice inefficient, and of coddling

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14. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding by unanimous court that pretrial motion for return of illegally seized evidence should have been granted).

15. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding corporations are protected against unlawful searches and seizures).

16. *See* Hale v. Henkel, 201 U.S. 43, 69 (1906) (declaring right against self-incrimination is purely personal, and cannot protect a third party).

17. *See* Agnello v. United States, 269 U.S. 20, 35 (1925) (suppressing cocaine seized in warrantless search).

18. *See* Boyd v. United States, 116 U.S. 616, 634-35 (1886) (holding statute providing that failure to produce business records in forfeiture proceeding would be deemed a conclusive admission of facts alleged in complaint violated Fourth and Fifth Amendments).

19. Wigmore, *supra* note 1.

> the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law a greater danger to the community than the unpunished murderer or embezzler or panderer.[20]

Finally, Wigmore proposed direct enforcement of the Fourth Amendment as an alternative to the exclusionary rule, in the form of summary imprisonment of police who violate the Constitution.[21] Wigmore's essay drew a prompt rebuttal from Connor Hall, a prominent lawyer and reformer.[22] Hall pointed out that the timely motion to suppress amounts to a self-contained proceeding, and that the Supreme Court itself had rejected suppression motions made *during* rather than *before* the trial.[23] With respect to the cost of the exclusionary rule, Hall wrote:

> If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive. The Fourth Amendment guarantees, or pretends to guarantee, to the citizen that he shall be secure against unreasonable searches and seizures. If this guarantee is to be made effective, then it is the duty of the court whenever the right is violated to undo as fully as it can the wrong which has been done–that is, to give a remedial and specific justice by ordering the return of that which has been taken unlawfully and in violation of rights. It is but a mockery of the Constitution for a court, whose duty it is to protect the citizen, to retain the fruits of violations and illegality and to give the complaining citizens nothing but a pretence of redress by threatening against the wrongdoer a punishment, which is seldom or never inflicted.[24]

In Hall's view, any effective Fourth Amendment remedy will prevent the discovery of some evidence of serious crimes. The "cost" belongs to the Fourth Amendment, not to the remedy. Critics of the exclusionary rule who advocate alternative remedies are hypocrites who endorse other remedies because they know them to be practically ineffective.

The modern debate over the exclusionary rule has not moved very far from the clash between Wigmore and Hall. During the forties and fifties, an increasing number of judges and scholars came to the conclusion that damage actions, administrative discipline, and criminal prosecutions were completely ineffective remedies for Fourth Amendment violations.[25] In 1961, a majority of the Supreme

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20. *Id.* at 482.

21. *Id.* at 484.

22. *See* Connor Hall, *Letters of Interest to the Profession, Evidence and the Fourth Amendment*, 8 A.B.A. J. 646, 646-47 (1922).

23. *See id.* at 646.

24. *Id.* at 647.

25. *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) ("While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those

Court applied the exclusionary rule to the states as a matter of Fourteenth Amendment due process.[26]

Although the *Mapp* opinion cites judicial integrity as one justification for exclusion,[27] and although Justice Black concurred on *Boyd*-based self-incrimination grounds,[28] it soon became clear that the Court understood the rule as based exclusively on deterrence. The Warren Court refused to apply *Mapp* retroactively,[29] and the Burger Court soon explicitly embraced the deterrence rationale to justify admitting tainted evidence so long as it was not admitted in the prosecution's case at trial.[30] This, the justices reasoned, was sufficient to deter, and so the cost of exclusion in other contexts was unjustifiable.[31]

In reaction to the Burger Court's balancing approach to exclusion, dissenting justices[32] and academics[33] sought to develop categorical justifications for suppress-

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since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.") (citations omitted); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. & CRIMINOLOGY 255, 258-59 (1961) (discussing adoption of the *Weeks* rule by many state courts); *see also* People v. Cahan, 282 P.2d 905, 910-12 (Cal. 1955) (adopting a judicial rule to exclude evidence obtained in violation of the Fourth Amendment after concluding that other sanctions were not effective).

26. *See Mapp*, 367 U.S. at 655.

27. *See id.* at 660 ("Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.").

28. *See id.* at 661-666 (Black, J., concurring). *Compare* Wolf v. Colorado, 338 U.S. 25, 40 (1949) (Black, J., concurring) (agreeing with the "plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate") *with Mapp*, 367 U.S. at 666 (Black, J., concurring) ("I am persuaded . . . to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.").

29. *See* Linkletter v. Walker, 381 U.S. 618, 636 (1965) (holding exclusionary rule does not apply retroactively to cases that had already reached a final decision).

30. *See* United States v. Leon, 468 U.S. 897, 920-21 (1984) (determining that exclusionary rule does not apply when police reasonably rely on authority of search warrant); Stone v. Powell, 428 U.S. 465, 494 (1976) (holding exclusionary rule may not be invoked on petition for federal habeas corpus); United States v. Janis, 428 U.S. 433, 454 (1976) (concluding tainted evidence is admissible in civil proceedings); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (declining to extend exclusionary rule to grand jury proceedings).

31. Justice Powell laid out the theory in *Calandra*:

> The purpose of the exclusionary rule . . . is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . . In sum, the 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. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

414 U.S. at 347-48 (citations omitted).

32. *See, e.g., id.* at 357 (Brennan, J., dissenting) (declaring exclusionary rule serves "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government").

33. *See, e.g.*, William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000) (defending exclusion as restitution-type remedy); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than on an "Empirical Proposition"?*, 16 CREIGHTON L.

ing tainted evidence. None of these efforts has secured widespread agreement.[34] Even before the Court overruled *Boyd*,[35] the self-incrimination theory and property theories could not account for corporate invocation of the exclusionary rule or for the suppression of contraband.[36] Theories based on due process, judicial review, and judicial integrity have trouble explaining why an adequate deterrent remedy, whatever its form, would not provide an adequate forum for judicial review, uphold the law of the land, and preserve judicial integrity unstained.

More fundamentally, the Constitution does not protect a substantive right to commit crimes in private. Instead, it protects the lawful enjoyment of privacy, and, as a necessary evil, thereby has the regrettable effect of facilitating the concealment of crimes.[37] Any other view implies that the illegal search of the guilty is *worse* than the illegal search of the innocent. Any such view further implies that for the innocent victim of police excess there is no remedy that can satisfy the demands of judicial integrity or uphold the principle of judicial review, because the innocent cannot invoke the exclusionary rule. The only way for the exclusionary rule to protect the innocent is through deterrence.

REV. 565, 590-597 (1983) (advancing principle of judicial review as justification for exclusion); Thomas S. Schrock & Robert C. Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 257-60 (1974) (characterizing search and use of evidence at trial as a "unitary transaction," and defending exclusionary rule as necessary form of judicial review under *Marbury*); James Boyd White, *Forgotten Points in the Exclusionary Rule Debate*, 81 MICH. L. REV. 1273, 1277-79 (1983) (defending property-based theory of exclusion).

34. *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 422-441 (summarizing weaknesses in nondeterrent theories). One measure of how limited the appeal of nondeterrent theories are is the fact that proponents of such theories typically reject all but one, *see infra* note 126, and find it necessary to advance novel nondeterrent theories on an ongoing basis. *See, e.g.*, Heffernan, *supra* note 33.

35. *See* United States v. Doe, 465 U.S. 605, 617 (1984) (arguing when government subpoenas preexisting documents, only the act of production need be immunized); Fisher v. United States, 425 U.S. 391, 397 (1976) (asserting subpoena for client's preexisting documents in attorney's possession does not compel client to become a witness against himself).

36. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414-415 (1971) (Burger, C.J., dissenting) (stating that the Supreme Court has developed its exclusionary rule jurisprudence on deterrent theory grounds); Francis Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. & CRIMINOLOGY 246, 250-51 (1961) (claiming that the self-incrimination justification for the exclusionary rule does not prove the validity of the rule); Yale Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Court*, 43 MINN. L. REV. 1083, 1088-89 n.16 (1959) (highlighting flaws in the *Boyd* doctrine that claim the exclusionary rule prevents self-incrimination).

37. *See* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 920-921 (1986) (arguing that an exclusionary rule will benefit some criminals, but benefit to criminals is outweighed by benefits to society of protecting the right to privacy of individuals). That article gives a fuller explanation of what constitutional rights of the individual were at stake when evidence was illegally seized:

> The evil of the search lies not in the discovery of criminal evidence, but in the concomitant exposure to the government, and thereby the world, of all those telltales of personality revealed in any place we take for private. To view the exclusionary rule as a personal right is to constitutionally enshrine the pistol in the basement or the cocaine in the coffee can, and to ignore as immaterial the music on the stereo, the books on the shelf, and the fading letters in the bedroom bureau drawer.

Id.

So it is understandable that the conventional case for the exclusionary rule rests on deterrence. Perhaps best articulated by Supreme Court Justice Potter Stewart[38] and Justice Roger Traynor of the California Supreme Court,[39] this conventional case rests on three propositions. First, the Constitution implicitly requires effective remedies for violations of its terms, and, because the text does not specify particular remedies, the federal courts have discretion to devise effective remedies in light of contemporary circumstances. The federal courts, however, are under a clear duty to implement *some* effective remedy for constitutional violations. Second, alternatives to exclusion – civil damages, administrative discipline, and criminal prosecution – are practically ineffective. Third, exclusion, at least to a degree, in fact deters. Thus, pending the adoption of some effective remedial scheme by legislatures, the federal courts have the right – and so long as no other effective remedy is available, the duty – to exclude evidence seized in violation of the Fourth Amendment.

Justice Traynor expressed these propositions in the following way:

> If the constitutional guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. If such were the case there would be more force to the argument that a particular criminal should not be redressed for a past violation of his rights by excluding the evidence against him. Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.[40]

Justice Stewart took a similar tack: "the exclusionary rule *is* constitutionally required, not as a 'right' explicitly incorporated in the [F]ourth [A]mendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are

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38. *See* 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, 1385-90 (1983) (arguing the Constitution requires an effective remedy to prevent police officers from violating Fourth Amendment rights of individuals, and exclusionary rule is the most effective of possible remedies).

39. *See* People v. Cahan, 282 P.2d 905, 913-15 (Cal. 1955) (declaring the need for exclusionary rule to deter officers from illegal conduct); Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 328-30 (stating that for effective deterrence of illegal police conduct, federal courts must annunciate clear principles supporting exclusionary rule that are to be followed by federal and state courts).

40. *Cahan*, 282 P.2d at 913.

observed in fact."[41] I call the Traynor/Stewart account the conventional view because it commands wide support in the legal literature.[42]

Critics have made a variety of objections to this conventional case for exclusion. They assert (1) that the rule has the undesirable effect of releasing clearly guilty offenders;[43] (2) that the rule does nothing for innocent victims of police excess;[44] (3) that the rule's deterrent benefits are, as a factual matter, questionable;[45] (4) that, if the rule does deter, it over-deters by causing the police to refrain from borderline but lawful searches;[46] (5) that alternative remedies might be made much more effective by such arrangements as liquidated or punitive damages, excluding

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41. Stewart, *supra* note 38, at 1389. Justice Stewart expanded on what he thought was required by the Fourth Amendment when evidence was illegally seized:

> While the opinions in the *Weeks* and *Silverthorne* cases were surely correct in saying that the Constitution and the rule of law require that the [F]ourth [A]mendment not be reduced to a mere "form of words," that fact does not necessarily require that one particular remedy—exclusion—be adopted. Instead, the Constitution requires only that there be some *effective* remedy to ensure that agents of the government obey the [F]ourth [A]mendment. Thus exclusion is constitutionally required only if without it there would be no adequate means to sure that the government obeys the [F]ourth [A]mendment.

Id. at 1385 (citations omitted).

42. A leading Fourth Amendment scholar, Wayne LaFave, subscribes to a slightly more nuanced view than Justice Stewart and Justice Traynor. LaFave defends the exclusionary rule even on the assumption that it does not deter (although he thinks that it does, at least at some level) because abolishing the rule would *promote* widespread Fourth Amendment violations and because the rule provides a procedural vehicle for the courts to make the substantive law. *See* WAYNE LAFAVE, 1 SEARCH AND SEIZURE § 1.2, at 34-51 (3d ed. 1996) (examining alternatives to exclusionary rule and concluding that no alternatives will prevent Fourth Amendment violations). Many other commentators subscribe to the conventional view. *See, e.g.*, Donald Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 622-23 (1990) (arguing exclusionary rule is the only effective remedy that prevents illegal seizure of evidence); Arnold Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 908- 916 (1989) (claiming that courts must be judicious in applying exclusionary rule in order to deter illegal police conduct without suppressing lawfully obtained evidence); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 267-272 (1988) (discussing nondeterrent and deterrent theories of exclusionary rule and concluding that deterrent theory is ingrained in American legal culture).

43. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (denouncing the "monstrous price we pay for the exclusionary rule"); STEVEN SCHLESINGER, EXCLUSIONARY INJUSTICE 4 (1977) ("At the present time, when this country is experiencing a dramatic increase in the crime rate, it is especially appropriate to ask whether extensive exclusion of evidence and a consequent loss of convictions is justifiable."); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L. REV. 337, 371-72 (1939); Wigmore, *supra* note 1.

44. *See, e.g.*, Plumb, *supra* note 43, at 376 ("As a means of reparation for a wrong done an innocent man, the exclusion of evidence is no help."); SCHLESINGER, *supra* note 43, at 6 ("Certainly, it does not offer aid, compensation, or any meaningful remedy to the innocent victims of official misconduct."); Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797 (1994) ("[T]he exclusionary rule's deterrence rationale looks in the wrong place—to paradigmatically guilty criminal defendants rather than to prototypically law-abiding civil plaintiffs.").

45. *See, e.g.*, Plumb, *supra* note 43, at 380-381; SCHLESINGER, *supra* note 43, at 56-58.

46. *See, e.g.*, Richard Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54-58.

character evidence about unsavory plaintiffs;[47] and (6) that exclusion fosters police perjury, trial court tolerance of police perjury, and appellate court hostility toward substantive Fourth Amendment rights.[48] Let us follow the debate, point by point.

B. Point-Counterpoint

1. Cost

Defenders of the rule have rejoinders to each of these points. Following Hall, they point out that complaints about the cost of the rule contradict the claim that alternative remedies might be made effective. Any effective remedy that deters unconstitutional searches and seizures will cause the loss of evidence of serious crime. Ergo it is not fair to attribute lost convictions to the exclusionary rule. It is the Fourth Amendment, not the remedy for its violation, that prevents convicting the guilty.[49]

Second, pointing to a mass of empirical work done during the seventies and eighties, defenders of exclusion point out that evidence is rarely suppressed on constitutional grounds.[50] Even when evidence is suppressed, convictions still

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47. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting); Plumb, *supra* note 43, at 385-388; Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955); Amar, *supra* note 44, at 811-816; Posner, *supra* note 46, at 68.

48. *See, e.g.*, MALCOLM RICHARD WILKEY, ENFORCING THE FOURTH AMENDMENT THROUGH ALTERNATIVES TO THE EXCLUSIONARY RULE 18-19 (1982); SCHLESINGER, *supra* note 43, at 63; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914-915 (1991).

49. *See, e.g.*, People v. Cahan, 282 P.2d 905, 914 (Cal. 1955) ("It is contended, however, that the police do not always have a choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves."); LAFAVE, *supra* note 42, at 25-27; Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1620 (1996) ("Indeed, it might well be the case that effective civil remedies would cause the loss of more evidence than the elimination of the exclusionary rule would secure.").

50. In 1995, Thomas Y. Davies, the leading expert on empirical research on the effects of the exclusionary rule, testified as follows:

> In addition, there is a virtual consensus that only a tiny proportion of all arrests are lost because of inadmissibility of unconstitutional evidence. I estimated in 1983 that only one-half to two-and-one-half percent of all arrests were "lost" because of unconstitutional police conduct. The average appears to be *somewhat less than 1 percent.*
>
> The Supreme Court accepted that estimate in *Leon* and the Reagan Administration Justice Department effectively conceded that estimate, too.
>
> In addition a variety of evidence indicates that the arrests that are lost tend to be concentrated in the *less serious* drug possession cases. Few would be sentenced to prison if convicted.
>
> If the research done in the 1980's were repeated today, there is every reason to think that the "lost arrest" rate would be even lower, because search law has been relaxed even further since that date.

The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial, Hearing before the Senate Judiciary Comm., 104th Cong., No. J-104-10, at 143 (1995) (statement of Thomas Y. Davies) (citations omitted).

frequently result based on untainted evidence.[51] Lost cases only rarely involve murder or rape, but are concentrated in drug cases.[52] This data, defenders claim, shows both that the rule deters and that its costs are low, even if these costs are fairly attributable to the remedy rather than to the right.

The critics reply that the exclusionary rule sometimes does cost convictions that the Fourth Amendment did not forbid. If the police fail to obtain a warrant when they easily might have persuaded a judge that probable cause exists, or if the police search or arrest prior to the existence of probable cause when facts establishing probable cause would have subsequently come to light, exclusion terminates prosecutions that better police work might have obtained consistent with the Fourth Amendment.[53]

As for the empirical data, critics argue that even small percentages of enormous caseloads constitute a significant cost to justice.[54] They also attribute low suppression rates to police perjury and judicial hypocrisy, rather than to police compliance with constitutional standards.[55]

Fairly pursued, these arguments lead to the following conclusions. Exclusion does terminate a few prosecutions that the Fourth Amendment might have permitted given better police work; but because the very great majority of crimes are not cleared by arrest there is good reason to doubt that perfect police work would have secured convictions in very many of those few cases lost to suppression motions.[56] Other evidence about deterrence (increased warrant use and

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51. *See, e.g.*, REPORT OF THE COMPTROLLER GEN., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. CDG-79-45 (1979) (finding suppression motions based on Fourth Amendment granted in 1.3% of sample of 2,804 federal cases; convictions obtained in half of the cases in which motions were granted).

52. *See, e.g.*, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 44 (1994) (pointing out that in study of 7500 cases from nine counties in three states, only 40 defendants were acquitted because of suppression of physical evidence, and none of the motions granted in cases of offenses against the person involved serious cases such as murder, rape, armed robbery, or even unarmed robbery).

53. *See* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."); *id.* at 588 ("The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious."); Amar, *supra* note 44, at 794 ("In many situations, it is far from clear that the illegality of a search is indeed a but-for cause of the later introduction into evidence of an item found in the search."); Dripps, *supra* note 37, at 919 ("Even by its own logic, the connection between the Fourth Amendment and the exclusionary rule is overbroad, for exclusion often neutralizes evidence the police might have seized constitutionally."); Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 493-494 ("Yet, the probabilistic truth is that if the illegal search were not undertaken, there would be a substantial likelihood that the evidence would be obtained because the suspicious officer can continue to gather more information, and may eventually satisfy the probable cause standard and then undertake a legal search of the house.").

54. *See* United States v. Leon, 468 U.S. 897, 907-908 n.6 (1984).

55. *See generally* WILKEY, *supra* note 48; Christopher Slobogin, *Testilying: Police Perjury and What to do About It*, 67 U. COLO. L. REV. 1037 (1996) (suggesting abolition of exclusionary rule as a solution for reducing police lies).

56. *See* Dripps, *supra* note 49, at 1609-1620 (finding only 20% of crimes known to police are cleared by arrest).

improved police training following adoption of the exclusionary rule)[57] suggests that low suppression rates are partly due to police compliance, while empirical evidence about police perjury suggests that low suppression rates are also partly due to "Fourth Amendment fraud."[58] Which factor plays the greater role is problematic. If the exclusionary rule is the only effective remedy, critics of the rule would have great difficulty justifying discarding it based on the very small (but admittedly genuine) cost of the exclusionary remedy measured in terms of convictions that are lost to exclusion that might have been constitutionally obtained by better police work.

2. Protecting the Innocent

Critics of exclusion observe that the rule does nothing for innocent victims.[59] Defenders of the suppression remedy respond by claiming that an effective deterrent remedy for the guilty protects the innocent in future cases.[60] The reverse is also true: An effective tort remedy for the innocent would protect the guilty, because the police cannot know *ex ante* who is innocent and who is not.[61] Compensation for victims of unconstitutional searches, whether the victims be guilty or innocent, is a laudable goal, which the exclusionary rule can never achieve. An effective tort remedy would make exclusion for deterrent purposes unnecessary, and would, as Hall argued, cause the loss of as much evidence as any other effective remedy. Fairly pursued, these arguments over protection of the innocent reduce to the dispute about whether tort remedies can be made effective, because only effective tort remedies could recompense innocent search victims directly.

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57. *See* LAFAVE, *supra* note 42, at 30-31; Dripps, *supra* note 42; Maclin, *supra* note 52, at 71.

58. I borrow this alliterative epithet from Kevin Reitz, *Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061 (1996). Reitz himself is agnostic about the scope of the police perjury problem, but there is widespread agreement that police perjury is both common and commonly successful. *See, e.g.*, Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 248-250 (1998) (finding widespread police perjury where suspects' Fourth Amendment rights were violated); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994) (discussing police perjury where suspect's Fourth Amendment rights were violated); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 77 (1992) (using study conducted on Chicago policemen to illustrate higher instances of perjury in instances of Fourth Amendment violations); H. RICHARD UVILLER, TEMPERED ZEAL 111 (1988).

59. *See supra* note 44.

60. *See, e.g.*, People v. Cahan, 282 P.2d 905, 913 (Cal. 1955) ("The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopted will have on the rights of those not before the court."); Dripps, *supra* note 42, at 622-623 ("But if the rule does uniquely deter, then its enforcement provides the only practical protection for the innocent who would otherwise suffer detention and home intrusion outside the courtroom."); Plumb, *supra* note 43, at 379 (exclusion "may have a real effect in discouraging the authorities from using such means in the first instance, if they are not to be able to use the product of their acts. If it has this effect, it cannot be denied that innocent as well as guilty will benefit.").

61. *See, e.g.*, Hall, *supra* note 22, at 647; Stuntz, *supra* note 48, at 901.

3. Deterrence

Critics have questioned whether the exclusionary rule really deters. Defenders cite the following evidence: (1) all modern studies find that the rate of successful suppression motions is quite low;[62] (2) warrant use skyrocketed after *Mapp*;[63] (3) police departments instituted or greatly expanded training programs in Fourth Amendment law in response to the exclusionary rule;[64] (4) deliberate efforts by police to avoid exclusion—by compliance with specific court decisions,[65] by pretext arrests,[66] by third party searches to exploit the standing exception,[67] and even by police perjury—show that the police shape their behavior in response to the risk of suppression; (5) police and prosecutors say that they are influenced by the risk of suppression;[68] and (6) the faith of critics of the rule in the ability to deter criminals is inconsistent with skepticism about deterring the police.[69]

Critics reply that the low rate of suppression motions reflects Fourth Amendment fraud rather than police compliance,[70] that warrant use went up in the 1960s on account of other factors such as intensified drug enforcement,[71] and that police

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62. *See* Davies, *supra* note 50.

63. *See* 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, 708-811 (1974) (finding that warrant use in Cincinnati rose from 0-7 per year to 89-113 following *Mapp*; in Boston, the number of warrants rose from 176-267 to 560-940); Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 293 ("Before the *Mapp* decision, search warrants were virtually unknown and unused writs in many states having no exclusionary rule of their own."); Michael Murphy, *Judicial Review of Police Methods in Law Enforcement*, 44 TEX. L. REV. 939, 941-42 (1966) (stating that prior to *Mapp*, search warrants "had been rarely used," but as of December 1965, less than four years after *Mapp*, 17,889 had been obtained).

64. *See generally* Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercise in Futility*, 60 IND. L.J. 287, 291 (1985); 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, 337-338 (1991); Wayne LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 448 (1990).

65. *See* William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 400-401 & nn.174-175 (1981).

66. *See* Whren v. United States, 517 U.S. 806, 812 (1996).

67. *See* United States v. Payner, 447 U.S. 727, 731-732 (1980).

68. *See, e.g., The Exclusionary Rule Bills: Hearings on S. 101, S. 755 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. On the Judiciary*, 97th Cong. 335-36 (1981) (statement of G. Robert Blakey) ("To the degree that I have been involved in [criminal justice] for 20 years, I will tell you unequivocally that the suppression rule, in fact, deters . . . . Anyone who suggests to you the contrary, in my judgment, does not know what he is talking about.").

69. *See, e.g.*, Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431-32 (1974).

70. *See* SCHLESINGER, *supra* note 43, at 54 (discussing studies by Michael Ban); *see also supra* note 48 (addressing likelihood of an increase in police perjury and trial court tolerance of police perjury as a result of exclusionary rule).

71. *See* Steven R. Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?*, 62 JUDICATURE 404, 407 (1979) (describing findings of a 1974 study that attributed a 55% increase in search warrant issuance to a rise in drug crime).

cannot be deterred because Fourth Amendment law is unknowably complex.[72] Defenders reply that widespread police perjury is not inconsistent with widespread compliance, and that perjury itself shows that the police are motivated by the desire to obtain admissible evidence. Thus, cracking down on police perjury would enhance deterrence.[73]

Alternative causes seem incapable of explaining orders-of-magnitude jumps in warrant applications in the immediate aftermath of *Mapp*. Moreover, while other factors might explain an increase in the frequency of *searches*, only the exclusionary rule can explain the increase in the use of *search warrants*. But for the exclusionary rule, why bother with warrants?[74]

Defenders of exclusion cite police ignorance of the law as a positive justification for suppressing tainted evidence. Suppression encourages police training programs,[75] which are the strongest predictor of police knowledge of the law.[76] Whatever Fourth Amendment law was like in the 1970s, it has now been made (however arbitrary) reasonably clear by the Supreme Court's efforts to develop bright-line rules.[77] When empirical evidence is uncertain, basic assumptions about rational behavior suggest that the rule *ought* to deter, just as the admission of evidence of subsequent remedial measures in tort suits is thought–without empirical support of any kind–to deter needed repairs.[78] Fairly pursued, these arguments

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72. *See, e.g., The Exclusionary Rule Bills: Hearings on S. 101, S. 751, and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong. 143 (1981) (statement of George Nicholson) ("No rule can be a good deterrent if it cannot be understood."); HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE IN AMERICA ch. 2 (1996) (noting exclusionary rule is comprised of complex legal doctrines that police officers and judges often cannot understand).

73. For different possible approaches, compare Cloud, *supra* note 58, with Slobogin, *supra* note 55, and with Donald Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 694 (1996).

74. *See* Canon, *supra* note 63, at 714 ("[T]he narcotics phenomenon explains to a large extent the tremendous increase in police use of search warrants during the past half dozen years, but it does not explain police decisions to seek search warrants rather than operate without them. The exclusionary rule explains this.").

75. *See* LAFAVE, *supra* note 42, at 43:

> But if at a suppression hearing it is shown that the arresting or searching police officer acted illegally because of an insufficient understanding of the Fourth Amendment's limits on his power, this is hardly a case for withdrawing the exclusionary sanction on the ground that the policeman was not in a condition to be deterred in this instance. Rather, it is an especially compelling case for applying the exclusionary rule so as to encourage the taking of such additional steps as will enhance police understanding of these limits.

76. *See* 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, 337 (1991) (reporting study results indicating that, among the variables considered, in-service programs had the most significant relationship with knowledge of law).

77. *See, e.g.*, Dripps, *supra* note 49, at 1607 n.212 ("Police manuals manage to capture the essentials in remarkably few pages."); Davies, *supra* note 50, at 143 ("[S]earch law is already government-friendly. The complexity in this area often arises only because there are several overlapping legal justifications that can be given for a particular search.").

78. *See, e.g.*, Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984) (Posner, J.) ("The analysis is not fundamentally affected by whether the basis of liability is the defendant's negligence or his product's

lead to the conclusion that the rule has had a significant impact on police behavior, although the magnitude of that impact is open to reasonable disagreement.

4. Over Deterrence

Judge Posner[79] and Professor Jeffries[80] have argued that exclusion over-, rather than under-, deters. The premise for the argument is that optimal deterrence is produced by setting the severity of the sanction discounted by its probability equal to the social costs of the infraction. Because they attribute zero value to the criminal's interest in escaping justified punishment, Posner and Jeffries each conclude that suppression injures the government out of proportion to the expected gain from constitutional violations. As a result, they predict that police will refrain from legal but borderline searches that might reveal very serious crimes.

The analysis is plausible only to the extent that exclusion frequently injures the police in the sense that they might ultimately have gained a lawful conviction but for a premature search or arrest and subsequent suppression ruling.[81] If the analysis of this question with respect to the cost issue is correct, however,[82] exclusion rarely has this effect. Far more commonly it only nullifies a conviction to which the government was not entitled under the Constitution. Thus, because the police typically lose nothing relative to the appropriate baseline of constitutionally permissible convictions, the rule is more likely to under- rather than to over deter.

Characterizing the illegal seizure of incriminating evidence as a social cost cuts against the grain, but such seizures are quite easily characterized as unjust enrichment. If the law aims to deter such illegalities, the sanction must be set at least equal to the government's gain. We can measure the government's gain from acquiring evidence by what the government is willing to pay to imprison those it successfully prosecutes. So measured, an illegally obtained conviction is worth *at least* $24,000 per year of prison imposed.[83] Maybe the convict, if he had the means, would pay even more to stay out of prison, so that exclusion overcompen-

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defectiveness or inherent dangerousness. In either case, if evidence of subsequent remedial measures is admissible to prove liability, the incentive to take such measures will be reduced.").

79. *See generally* Posner, *supra* note 46.

80. *See* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1476 (1989).

81. *See* Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 493-94. Judge Posner himself now appears to have adopted the view that the cost of exclusion is identical to the cost of effective damage actions. *See* Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533 (1999) ("If the substitute sanctions were effective in deterring the misconduct, there would not be any fruits, and so there would be no net gain from the standpoint of accuracy in adjudication."). This is still not quite correct, because exclusion, unlike damages, will pretermit a few convictions that the Fourth Amendment would have permitted given better police work.

82. *See supra* notes 49-55 and accompanying text (presenting both sides of the debate on the cost of the exclusionary rule).

83. *See, e.g.*, Loren A. N. Buddress, *Federal Probation and Pretrial Services—A Cost-Effective and Successful Community Corrections System*, 61 FED. PROBATION 5, 10 (1997):

sates the successful defendant. But overcompensation is not the same thing as overdeterrence. When both parties claim the right to ill-gotten gains, overcompensation may be necessary to achieve optimal deterrence.[84]

True, in a few cases suppression does cost the government a conviction the Constitution would have permitted given more careful police work, and the government then suffers a serious penalty, again measured by willingness to pay the costs of punishment.[85] This, however, is the unusual case.[86] In the other pan of the scales, the government still derives significant benefits from illegal searches, even when the fruits are suppressed. Drugs are taken off the streets and that loss is imposed on the dealer. Moreover, illegal searches turn up useful information that may turn into convictions down the road.[87] Finally, the standing doctrine means that in a great many cases a successful suppression motion will cost the police the conviction of some, but by no means all, of those involved in a conspiracy. Thus it seems far more likely that the exclusionary rule, even when honestly applied, under- rather than over deters.

Moreover, it seems clear that any damage system that effectively deterred unreasonable searches and seizures would deter far more reasonable searches and seizures than the exclusionary rule. As Peter Schuck pointed out in a leading study, low-level officials exercising discretionary power do not fully internalize the benefits of correct decisions, but may very well bear the brunt of the cost of tort remedies, and may perceive their potential liability to be even greater than it

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> The imprisoned offender requires not only the cost of housing ($21,352 plus medical expenses of $3,431 equals a total cost per inmate, per year, of $24,783), but, very likely, other expenses to the taxpayer as well. As a result of the individual going to prison, if the offender's family goes on welfare, the costs are approximately $8,000 per year (according to the California State Department of Social Services public information office). Additionally, the individual is paying no state or federal taxes while incarcerated and is paying relatively little toward a fine or restitution.

84. *See* Jeffries, *supra* note 80, at 1476 ("Ultimately, the question is empirical, but risk seems great that a strictly compensatory remedy would be instrumentally inadequate.").

85. *See supra* note 53 (explaining that government loses convictions due to exclusionary rule even in cases where police could have performed lawful searches).

86. *See* Levmore & Stuntz, *supra* note 81, at 494 (characterizing the opportunity cost exacted by exclusion as significant, but agreeing that the possibility that "the very same evidence would be legally obtained later in the investigation" exists "but is surely less than 50%"). My own view, based on the prevailing clearance rate of 20% (i.e., only 20% of crimes reported to police result in an arrest), the typical conviction rate of 50% or thereabouts (i.e., only about half of arrests lead to convictions), together with the fact that clearance rates grossly overstate success in drug cases because successful drug transactions are not reported to police, is that the opportunity-cost scenario is far less likely. Dripps, *supra* note 49, at 1609. Moreover, the clearest case of opportunity-cost is the failure of police to seek a warrant the law requires when they clearly have established probable cause. If we reject a probable cause exception to the warrant requirement, which seems to follow from requiring warrants in the first place, the opportunity-cost of the exclusionary rule, slight to begin with, would be seriously reduced.

87. *See, e.g.*, Plumb, *supra* note 43, at 380 (arguing exclusion does not deter because "the value of the raid on suspicion and the tapping of wires is fully as great for 'getting a lead' as it is for getting evidence useful in court"). The proposition that the prospect of derivative evidence reduces the deterrent impact of exclusion is not, of course, the same as the proposition that the rule does not have an important deterrent effect.

actually is.[88] Entity liability might reduce the problem, but whoever is in charge of monitoring line officer conduct to minimize the employer's liability will face a similar incentive to train and discipline the force to act in an overly passive way.[89]

5. Alternative Remedies

Ever since Hall, defenders of exclusion have pointed to the impotence of other remedies. Ever since Wigmore, critics have argued that direct remedies for Fourth Amendment violations, even if ineffective as presently arranged, could be made effective. Ever since Hall, defenders have replied that such remedies are pipe-dreams which, if ever realized, would cause the loss of more evidence and generate more police perjury than the exclusionary rule.

There is general agreement on the ineffectiveness of tort actions under current law.[90] The reasons most commonly cited are inadequate damages,[91] immunity defenses,[92] individual liability,[93] juror prejudice,[94] and lack of representation.[95] Tort suits for unconstitutional police homicides under *Tennessee v. Garner*[96] have had a significant deterrent impact.[97] The difference between search-and-seizure suits and homicide suits shows that given substantial damages, the tort remedy can deter police misconduct.

If legislatures provided by statute for substantial liquidated and punitive

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88. *See* PETER H. SCHUCK, SUING GOVERNMENT 55-81 (1983).

89. *See id.* at 106-107.

90. To cite only critics of the exclusionary rule, see SCHLESINGER, *supra* note 43, at 77-84 (summarizing problems with civil suits but expressing faith that damage actions could be made effective); Amar, *supra* note 44, at 811-16 (calling for entity liability, abolition of immunity defenses, punitive damages, class actions, and attorney's fees); Posner, *supra* note 46, at 62 ("All this is not to deny the difficulties of formulating tort remedies that will deter violations of the Fourth Amendment effectively."). The available statistics bear out the pervasive belief in the impotence of existing tort remedies. *See also* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATT'Y GEN. ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, TRUTH IN CRIMINAL JUSTICE REP. NO. 2 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 591, 626-29 (1989) (stating that since 1971, plaintiffs filed 12,000 *Bivens* actions; in only five cases did the defendants actually pay damages). It was not clear whether these cases involved search and seizure or other constitutional violations, and the authors discovered "fewer than three dozen reported [F]ourth [A]mendment cases over the past 20 years" under 42 U.S.C. § 1983. *Id.* The Report then shamefully and shamelessly concluded that "although both could be improved, the necessary disciplinary provisions already exist in the federal system and federal civil remedies provide adequate redress and deterrence in their present form." *Id.* at 639. So far as I know, the DOJ Report is the only published commentary on the exclusionary rule that favors abolishing the rule without dramatic reforms in the tort remedy.

91. *See, e.g.*, Amar, *supra* note 44, at 815.

92. *See id.* at 812-15 (criticizing immunity defenses for creating "shocking remedial gap"); Posner, *supra* note 46, at 64-68; Foote, *supra* note 47, at 502-503.

93. *See* Amar, *supra* note 44, at 813-14; Foote, *supra* note 47, at 514; Posner, *supra* note 46, at 66.

94. *See* SCHLESINGER, *supra* note 43, at 81; Foote, *supra* note 47, at 504-07 (noting that a plaintiff's unsavory record will be admissible to impeach testimony and to mitigate damages).

95. *See, e.g.*, SCHLESINGER, *supra* note 43, at 80; Amsterdam, *supra* note 69, at 430.

96. 471 U.S. 1 (1985).

97. *See* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 257 (1994) (attributing to *Garner* a 16% reduction in homicides by police).

damages in constitutional tort suits, accepted entity liability or explicitly indemnified individual officers, abrogated immunity defenses and limited character evidence about plaintiffs, tort suits could be made into effective deterrents.[98] They would, however, carry the downside of effective deterrents: they would cause many crimes to go unexposed,[99] foster police perjury to defeat liability,[100] and might chill officers from conducting justified but borderline searches and seizures.[101]

Cogent scholarly calls for an effective alternative remedy have appeared in a steady stream ever since the 1920s.[102] None has ever been adopted by legislatures.[103] Politically speaking, who wants to handcuff the police at the expense of the public treasury? This is an important point for purposes of constitutional doctrine, at least if one even partially subscribes to the representation-reinforcement theory of judicial review.[104] If legislatures have rational incentives

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98. A virtual chorus of commentators has commended such reforms. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting); Foote, *supra* note 47, at 514; Posner, *supra* note 46, at 68.

99. *See, e.g.*, JOHN KAPLAN, CRIMINAL JUSTICE 216 (2d ed. 1978) ("Any rule which actually enforced the demands of the Fourth Amendment (whatever they may be) would prevent the conviction of those who would be caught through evidence obtained in violation of the Fourth Amendment."); Hall, *supra* note 22; Plumb, *supra* note 43, at 381.

100. *See* Reitz, *supra* note 58, at 1071 ("As Professor Slobogin concedes, a liquidated damages regime will do little to reduce temptations felt by police officers to lie about Fourth Amendment transgressions. If anything, the police will be more invested in avoiding their own monetary exposure than in circumventing the exclusionary rule.") (footnote omitted); Slobogin, *supra* note 55, at 1059 ("Of course, the fact that a damages action directly affects the officer's wallet might produce even more incentive than the exclusionary rule to dissemble about illegal investigative actions."). Surveys of police attitudes show that police officers prefer the exclusionary rule to tort remedies. *See, e.g.*, Orfield, *supra* note 58, at 1053.

101. *See* Levmore & Stuntz, *supra* note 81, at 490 ("Under these circumstances, if damages are imposed for illegal action (and if, as is probably the case in all legal systems, the standards that determine what is legal are somewhat vague), there is the serious danger that society will not only get fewer illegal searches and seizures, but will also get many fewer legal ones.").

102. For a selected sample of high-profile approaches in reverse chronological order, see Amar, *supra* note 44, at 811-16; WILKEY, *supra* note 48, at 26-38; Posner, *supra* note 46, at 68; SCHLESINGER, *supra* note 43, at 71-92; *Bivens*, 403 U.S. at 422 (Burger, C.J., dissenting); Foote, *supra* note 47, at 514; Plumb, *supra* note 43, at 385-92; Wigmore, *supra* note 1, at 484.

103. *See* Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'an Empty Blessing,'* 62 JUDICATURE 337, 346 (1979):

> Finally, and most importantly, *for many decades* a majority of the states had no exclusionary rule but *none of them* developed any meaningful alternative. Thirty-five years passed between the time the federal courts adopted the exclusionary rule and the time *Wolf* was decided in 1949, but none of the 31 states which still admitted illegally seized evidence had established an alternative method of controlling the police. Twelve more years passed before *Mapp* imposed the rule on the state courts, but none of the 24 states which still rejected the exclusionary rule had instituted an alternative remedy.

(footnotes omitted) (emphasis in original).

104. The obligatory citations are to *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1981).

for ducking the issue,[105] and if they have in fact ducked the issue despite prominent calls for reform over the course of three-quarters of a century, there is good reason for saying that the federal courts are the only plausible source for effective constitutional remedies.

6. Fourth Amendment Fraud

Critics claim that low suppression rates reflect police perjury and judicial hypocrisy.[106] Recent evidence of widespread police perjury supports this argument.[107] Obviously the low suppression rate results from some combination of police compliance and Fourth Amendment fraud; which element has the most influence is a matter of guesswork. For what it is worth, I have counted myself as a strong defender of the exclusionary rule, but I think the Fourth Amendment fraud problem calls for some serious reconsideration of our present remedial scheme.

Fourth Amendment fraud helps to explain almost every consistent finding in the empirical literature. Early studies found that suppression motions were frequently granted, but since then the studies have consistently found that successful suppression motions are quite rare.[108] Success is concentrated in minor cases.[109]

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105. The consistent tough-on-crime attitudes of elected legislatures reflects the rational self-interest of the electorate, and so is likely a permanent feature of our political institutions. Or so I have argued. *See generally* Donald Dripps, *Criminal Procedure, Footnote 4, and the Theory of Public Choice: OR, Why don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYR. L. REV. 1079 (1993). Professor Slobogin, in an important recent article, argues that the advantages of an administrative tort remedy might make it politically attractive. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363, 445. Yet Professor Slobogin's proposal strongly resembles Chief Justice Burger's proposed replacement for the exclusionary rule. *Cf. Bivens*, 403 U.S. at 422. We are approaching the thirtieth anniversary of the Burger proposal, with no sign that Congress or any state legislature has any interest in experimenting with an administrative remedy.

106. *See supra* notes 55 & 69. *See also* Slobogin, *supra* note 105, at 376.

107. *See supra* note 58.

108. *Compare* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 681-689, 706-707 (1970) (stating that in Chicago, 45% of gambling cases, 33% of narcotics cases, and 24% of weapons cases were dismissed after successful suppression motions, which shows that "the exclusionary rule does not deter the Chicago police from making illegal searches and seizure in a large proportion of the cases that come to court in these crime areas"), *with* REPORT OF THE COMPTROLLER GEN., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. CDG-79-45 (1979) (stating suppression motions based on Fourth Amendment are granted in 1.3% of 2,804 federal cases); ROBERT VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 57 (1983) (stating motions to suppress are granted in 5% of prosecutions involving search warrants); 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 Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 617-622 (stating that NIJ study indicates that California prosecutors decline fewer than 1% of felony arrests because of search and seizure problems; other studies indicate that exclusionary rule's effect on all stages of arrest processing "results in the nonprosecution and/or nonconviction of in the range of 0.6% to 2.35% of felony arrests in the jurisdictions studied"); Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 598 (Table 8) (stating that successful motions to suppress physical evidence occurred in 0.69% of 7,484 cases sampled). The 5% figure might seem high, but it should be remembered that, at least pre-*Leon*, search-and-seizure issues are almost certain to arrive in cases based on a successful search warrant.

109. *See* Maclin, *supra* note 52.

One famous early study documented a dramatic increase in "dropsy" testimony following *Mapp*.[110] To a significant extent the police training programs instituted or expanded after *Mapp* taught the police how to comply with the law, even while the Supreme Court was making the law more generous to the government. But Fourth Amendment fraud could support a very different story; if *Mapp* caused the police to resort to "dropsy" testimony and other perjurious tactics, and the courts accepted such "testilying," suppression rates would be low even though Fourth Amendment compliance is also low.

Courthouse regulars will sometimes speak as though Fourth Amendment fraud were part of established jurisprudence. They may, for example, quite casually refer to the kilogram exception to the exclusionary rule. The kilogram exception provides that the exclusionary rule does not apply to quantities of heroin or cocaine that exceed one kilogram in weight. The pressure to circumvent the exclusionary rule is not confined to state courts or elected judges. In the wake of widespread criticism, for instance, Judge Baer reversed an order to suppress a large quantity of illegal drugs in the *Bayless* case.[111] The Clinton White House, it will be recalled, thought that suppressing a large quantity of drugs might require a presidential demand for the judge's resignation.[112]

One might approach the Fourth Amendment problem by demanding more rigorous fact-finding in suppression cases. For instance, polygraph evidence might be made admissible at suppression hearings, where there is no jury to be swept away by the aura of science.[113] The Fifth Circuit's *Posado* decision threw out the *per se* ban on polygraph evidence on appeal from the denial of a suppression motion.[114] The government claimed that the defendants had consented to an airport search of double-locked suitcases to which the suspects did not have a key; the luggage had to be opened with a pen knife. The suitcases contained forty-four kilograms of cocaine. An airline employee partially corroborated the defense account, and the key police witness had given discredited testimony in another case.[115] The defendants offered the testimony of an expert that they had passed polygraph examinations corroborating their testimony.

On remand the district judge again excluded the polygraph evidence,[116] and added that even if it were admissible he still would have credited the law

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110. "Dropsy" testimony is police testimony that the defendant dropped narcotics, thus leaving them in plain view or abandoning them for standing purposes. *See* People v. McMurty, 314 N.Y.S.2d 194 (N.Y. Crim. Ct. 1970) (Younger, J.) (describing said phenomenon). On the increase in such testimony following *Mapp*, see Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968).

111. United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996).

112. Allison Mitchell, *Clinton Pressing Judge to Relent,* N.Y. TIMES, Mar. 22, 1996, at A1.

113. *See* Dripps, *supra* note 73, at 703-14.

114. United States v. Posado, 57 F.3d 428 (5th Cir. 1995).

115. *See id.* at 435.

116. United States v. Ramirez, No. CRIM. H-93-252, 1995 WL 918083 (S.D. Tex. Nov. 17, 1995) (unpublished order).

enforcement testimony.[117] Obviously, the kilogram exception is alive and well in Texas. The *Posado* experience does not suggest that polygraph evidence should be excluded in suppression motion hearings, but it does suggest that polygraph evidence by itself will not change the governing dynamics in suppression cases.

I have previously argued that Fourth Amendment fraud reflects a lack of judicial will rather than an inherent defect with the exclusionary rule.[118] But I have come to the conclusion that practical enforcement of constitutional rights requires some recognition of the natural human reluctance to free serious criminals. Judges who acquiesce in police perjury or distort legal doctrine to avoid suppression are not traitors or tyrants, even though they may know that they are nullifying the Fourth Amendment. Indeed, in many cases judges still suppress evidence. If the law gave them an option other than suppression or doing nothing, I believe that most of them would take that option in hard cases. Part III explores a mechanism that would give judges just such an option.

III. THE CONTINGENT SUPPRESSION ORDER

A. The Basic Idea

The irreducible problem with the exclusionary rule is the reluctance of judges, trial and appellate, to apply it. The irreducible problem with tort remedies is the public choice problem; *effective* alternatives to exclusion would be as unpopular as exclusion. And, although most of the technical problems with tort remedies–juror prejudice, immunity defenses, and limitations on *respondeat superior* liability–could be overcome by appropriate legislation, even if the public choice problem disappeared by magic, there would be considerable difficulty evaluating the appropriate damages for many typical constitutional violations. Overdeterrence and underdeterrence are both possible.[119]

So it makes sense to think about *combining* the exclusionary rule and damages in some type of hybrid model, as Alan Dalsass has recently argued in an insightful essay.[120] Dalsass envisions legislation providing judges with the option of damages, exclusion, or, in appropriate cases, both. Reliance on legislatures, however, confronts the public choice problem that experience has so consistently revealed. Moreover, legislatures crafting such a hybrid system would be as at sea about evaluating constitutional violations as ever.

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117. *Id.* at *5.

118. *See* Dripps, *supra* note 49, at 1611 ("In short, the exclusionary rule cases are in disarray not because of the rule's admitted limitations, but because the Justices since *Calandra* have lacked the clear understanding and unflinching determination of Holmes and Brandeis."). Fair enough – but where does one find a steady supply of Holmeses and Brandeises?

119. *See, e.g.*, Stuntz, *supra* note 48, at 900-906; Levmore & Stuntz, *supra* note 81, at 490-492.

120. *See* Alan Dalsass, *Options: An Alternative Perspective on Fourth Amendment Remedies*, 50 RUTGERS L. REV. 2297, 2315-21 (1998).

A trial court judge hearing a motion to suppress has the authority under current law to exclude the evidence if she finds that it is more likely than not that the evidence was obtained in violation of the movant's constitutional rights.[121] A judge who finds the police testimony implausible, but the release of the guilty unpalatable, needs no new authority to impose a slightly modified remedy; exclusion of the evidence contingent on the failure of the police department to pay damages set by the court. The judge thereby could vindicate the Constitution without freeing the guilty. The prosecution would have to decide whether justice was worth the damages.

Prosecution objections to such an order could be easily dismissed. If the court has authority under current law to order suppression *simpliciter*, the prosecution is in an improved position with the option of paying the damages. Practically, the government may be in a worse position because of the increased willingness of the judge to find the facts favorable to the defense, but the government is hardly in a position to claim judicial acquiescence in police perjury as a legal entitlement. The government could no more object to a contingent suppression order than defendants can object to plea bargaining.[122]

Less formalistically, if the damages are set high enough to deter, and are paid to compensate the victim of the police misconduct, the contingent suppression order is justified by more than a greater-includes-the-lesser type of argument. The judge is not offering to cancel the suppression order if the police department mows the judge's lawn or provides free security at rock concerts. The judge is offering to rescind one, purely deterrent, remedy if and only if the government submits to another remedy that deters equally and compensates better. I can see absolutely no plausible argument that such a contingent suppression order exceeds the judge's authority relative to the government.

The defendant has a stronger argument. The defendant might insist either that exclusion is mandated by such considerations as judicial integrity,[123] restitution,[124] or the Fifth Amendment privilege against self-incrimination.[125] All of these arguments have fared poorly in the literature.[126] Even if this view of the merits of

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121. The Supreme Court approved this allocation of the burden of proof in *United States v. Matlock*, 415 U.S. 164, 177-178 (1974).

122. *Cf.* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1977) ("But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.").

123. *See* United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); Elkins v. United States, 364 U.S. 206, 222-224 (1960).

124. *See, e.g.*, Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998).

125. *See* Mapp v. Ohio, 367 U.S. 643, 661-66 (1961) (Black, J., concurring); Olmstead v. United States, 277 U.S. 438, 472-479 (1928) (Brandeis, J., dissenting).

126. Many nondeterrent theories of exclusion are rejected, sometimes derisively, even by proponents of other nondeterrent theories. *See* Schrock & Welsh, *supra* note 33, at 263-269 (rejecting judicial integrity theory); *id.* at 363 n.276 (rejecting property theory); *id.* at 316-317 n.158 ("Critics properly scorn . . . exclusion as *compensa-*

nondeterrent justifications for exclusion is uncharitable, the Supreme Court has emphatically banished all such considerations from the positive law.[127] Exclusion is mandated because exclusion uniquely deters. If something else deterred as well, exclusion would not be constitutionally required.

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tion for unreasonable search and seizure.") (emphasis in original); Kamisar, *supra* note 36, at 1088-1090 n.16 (criticizing self-incrimination theory). Theories based on judicial review or judicial integrity seem the most defensible, but such theories have difficulty overcoming two powerful counterarguments: (1) an illegal search of an innocent person, or of a guilty person who is never prosecuted, is at least as bad as a search of a guilty person that results in a prosecution; and (2) an adequate deterrent remedy satisfies the demands of judicial integrity and/or judicial review. The innocent cannot invoke the exclusionary rule; if the exclusionary rule is an essential part of the Fourth Amendment, have the innocent no Fourth Amendment rights? If the innocent do have Fourth Amendment rights, then some remedy *other than exclusion* must somehow satisfy the demands of the Constitution. And even if we limit our focus to the guilty, how does exclusion, compared with the practically improbable but theoretically important ruinous punitive damages award, advance judicial integrity or judicial review?

127. As early as 1969, Justice Black, who had concurred in *Mapp* and dissented in *Linkletter,* on *Boyd*-based self-incrimination grounds, wrote that:

> The purpose of the exclusionary rule, unlike most provisions of the Bill of Rights, does not include, even to the slightest degree, the goal insuring that the guilt-determining process be reliable. Rather, as this Court has said time and again, the rule has one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police.

Kaufman v. United States, 394 U.S. 217, 238 (1969) (Black, J., dissenting). Today, any theory of exclusion based on considerations other than deterrence would call into question the following Supreme Court precedents: (1) the good-faith cases, Illinois v. Krull, 480 U.S. 340, 360 (1987) (holding tainted evidence was admissible in prosecution's case-in-chief when police relied on facially valid statute), United States v. Leon, 468 U.S. 897, 926 (1984) (holding tainted evidence admissible in prosecution's case-in-chief when police relied on facially valid warrant), Massachusetts v. Sheppard, 468 U.S. 981, 990-91 (1984) (holding tainted evidence admissible when defects in warrant were attributable to judge rather than to application filed by police); (2) the impeachment cases, United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding tainted evidence admissible to contradict denial of charge elicited from accused during cross-examination by the government), Walder v. United States, 347 U.S. 62, 64-65 (1954) (holding tainted evidence, suppressed in one prosecution, admissible in a subsequent, unrelated prosecution to contradict defendant's assertion on direct examination that he had never been involved with narcotics); (3) the collateral-proceeding cases, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding exclusionary rule does not apply in deportation proceedings), Stone v. Powell, 428 U.S. 465, 481-82 (1976) (holding exclusionary rule may not be invoked on petition for federal habeas corpus), United States v. Janis, 428 U.S. 433, 454 (1976) (holding exclusionary rule may not be invoked in federal civil tax proceeding based on evidence illegally seized by local police), United States v. Calandra, 414 U.S. 338, 351-52 (1974) (holding tainted evidence is admissible in grand jury proceedings); (4) cases refusing to give Fourth Amendment rulings either full or partial retroactive effect, United States v. Peltier, 422 U.S. 531, 542 (1975) (refusing to apply Almeida-Sanchez v. United States, 413 U.S. 266 (1973), retroactively), Williams v. United States, 401 U.S. 646, 658-59 (1971) (plurality opinion) (refusing to apply Chimel v. California, 395 U.S. 752 (1969), retroactively), Desist v. United States, 394 U.S. 244, 252-53 (1969) (refusing to apply Katz v. United States, 389 U.S. 347 (1967), retroactively), Linkletter v. Walker, 381 U.S. 618, 639-40 (1965) (refusing to apply *Mapp*, retroactively). In addition, the standing cases (which admittedly are hard to explain under *any* theory of the exclusionary rule) are clearly inconsistent with theories based on judicial integrity, judicial review, or due process. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 103-05 (1980) (holding petitioner lacked standing to challenge search of acquaintance's purse based on his ownership of drugs therein); Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (declining to extend exclusionary rule to evidence seized on a third party's premises or property); Alderman v. United States, 394 U.S. 165, 171-72 (1969) (holding exclusionary rule protects only those whose rights are violated, not those harmed by the evidence admitted); Agnello v. United States, 269 U.S. 20, 30-31 (1925) (holding a search of defendant's house several blocks from crime seen was not a search incident to arrest).

The key to the whole argument, of course, is how high to set the damages. Obviously, at a billion dollars per violation the government would always opt for exclusion and at one dollar per violation the government would always opt for the damages. As Bernard Shaw put it in a celebrated *bon mot*, what we are talking about now is the price.

The nightmare scenario from the defense perspective is that judges are really hostile to the Constitution and would set damages so low that deterrence would be reduced or eliminated. If the government routinely paid the damages and never accepted exclusion, no matter how minor the charge, we would know that this scenario had come to pass. It is this risk that causes me to put the contingent suppression order forward as a promising possible reform, rather than as a clear improvement on current remedies. Some experimentation in the lower courts might well inform an ultimate appellate decision as to whether the judges, especially where elected directly, can be counted on to impose damages high enough to deter.

This absolutely valid concern that the damages be set high enough differs greatly from the idea that damages alone, no matter how high, are an inherently inadequate response to government lawlessness.[128] The fear that a damage remedy puts Fourth Amendment rights up for sale is a prudent apprehension about the *amount* of damages. But damages alone, if set high enough, can provide an adequate constitutional remedy. Damages were the remedy the framers expected.[129] They are the only practical remedy for unreasonable searches and arrests of the innocent and for police brutality, including unreasonable shootings. If damages can supply a constitutionally adequate remedy for fatal shootings, as in *Tennessee v. Garner*,[130] they can scarcely be regarded as inherently inadequate for lesser intrusions.[131]

One appropriate safeguard against trivialization of Fourth Amendment rights would be to make exclusion mandatory in cases of knowing violations.[132] If the

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128. *Cf.* Dripps, *supra* note 49, at 1623 ("Absent the suppression remedy as a shotgun in the closet, civil remedies effectively put Fourth Amendment rights up for sale."); Jeffries, *supra* note 80, at 1467-68 (arguing police might view low damages as "cost of doing business"); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266 & n.168 (1983) (rejecting Posner's account "[b]ecause I do not believe constitutional rights are for sale whenever the government unilaterally decides to purchase them"). But we do not think of the right to freedom from arrest-by-shooting in minor cases as "up for sale," because we trust tort litigation to award weighty damages indeed for wrongful death.

129. *See, e.g.*, Amar, *supra* note 44, at 786 ("Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions."). It hardly follows that tort remedies should be exclusive even after they have become ineffective; but the idea that damages are inherently inadequate to remedy Fourth Amendment violations must confront the contrary view of the founders.

130. 471 U.S. 1 (1985).

131. *See id.* at 22 (upholding damages award resulting from fatal shooting by police officer).

132. *See* George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith Exception to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 24 (1993) (arguing that bad-faith violations call for excluding evidence even in contexts where the exclusionary rule ordinarily is not applied). The Court has not

police count on paying the damages, mandatory exclusion still would deter. One can imagine other possible safeguards; tripling the damages in cases of bad faith, say. But if the fear is that damages systematically will be set too low, the only sure deterrent for calculated violations is exclusion.

Similarly, some judicial vigilance might be necessary to prevent the government from clawing back the monies paid as damages. Charging the defendant for the costs of jail or prison, reducing the public defender's budget to offset damages or attorney's fees paid, and similar subterfuges would defeat the effectiveness of the Fourth Amendment remedy. To deter, damages must be net losses to the government. It follows that all such steps would be unconstitutional and subject to judicial correction by, for example, reversing convictions when it appears that the government effectively has reneged on payment.[133]

The contingent suppression order has major advantages over existing tort remedies. A court setting damages as an alternative to a suppression remedy within its independent constitutional power would not be constrained by traditional measures of damages, by existing statutes, or by precedents. Liquidated and/or punitive damages could be assessed directly against the city, without jury trial, without immunity defenses, and without legislative authorization. The familiar refrain of reforms necessary to create an effective tort remedy could be achieved at a stroke.

Dramatic innovation might smack of judicial activism, but in reality the new remedy comports with conservative principles. The Framers intended some effective remedy, which they assumed would be a tort action.[134] Thirty-nine years of Supreme Court precedent (eighty five years in federal cases) holds that the atrophication of tort remedies makes the exclusionary rule a constitutionally required replacement. The contingent exclusionary rule gives judges an opportunity to move closer to the original understanding while promoting the search for truth at trial, without compromising the enforcement of Fourth Amendment rights.

If the government chose to pay the damages and use the evidence, and the victim of the search subsequently brought a *Bivens* or Section 1983 action, the payment made to admit the evidence simply could be set off against any damages awarded

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been receptive to such arguments. *See, e.g.*, United States v. Payner, 447 U.S. 727, 731-32 (1980) (upholding admission against client of evidence seized by burglarizing hotel room of client's accountant).

133. *Cf.* Santobello v. New York, 404 U.S. 257, 263 (1971) (holding that where state did not keep commitment concerning a sentence recommendation on a guilty plea, state court must decide whether to order specific performance of plea agreement or to allow accused to withdraw guilty plea).

134. *See, e.g.*, Heffernan, supra note 33, at 835-36 ("As is well known, at the time of the Fourth Amendement's adoption, courts offered money damages, but not exclusion, for violation of the rules of search and seizure. Neither the [F]ramers nor the common-law judges who rendered opinions concerning search and seizure ever intimated that courts should consider exclusion as a remedy for violations of these rules.") (footnotes omitted). One can debate the significance of the founding-era practice; Professor Heffernan is himself a supporter of the exclusionary rule. My point is not that damages are the only permissible remedy because the founders relied on damages, but the distinct point that reinvigorated the role of damages in the remedial scheme should not be regarded as radical.

to the party that made the payment in the criminal case. Changes in the tort remedies may be desirable, but the proposed new remedy does not require any such changes.

What about innocent victims of unconstitutional searches and seizures? No court could order the contingent suppression of evidence that never existed. Still, practice with contingent suppression motions would help innocent plaintiffs overcome the valuation problem. Contingent order cases would establish *the minimum* damages required by the Constitution as a matter of deterrence. Innocent plaintiffs who can establish liability clearly should recover at least as much as their guilty counterparts. The prospect of substantial minimum recoveries would in turn make lawyers more willing to take constitutional tort cases, reducing the representation problem. And who knows? Good lawyers hunting substantial contingent fees might find ways around the other problems with traditional tort suits.

B. Technical Questions

1. Who Should Pay?

Damages must be set high enough to make clear that the award is a sanction rather than a price[135]–high enough to deter a government willing to spend hundreds of thousands of dollars to incarcerate an individual convict for a term of years. Arguably, lesser amounts suffice to deter the police, who operate on tight budgets and who derive no direct benefit from convictions. For purposes of determining the amount of damages, however, the polity should be regarded as unitary. Any government agency with an interest in convictions would be free to contribute funds to the police to cover the cost of damages. The state's attorney's office, the state attorney-general's office, the corrections department, and, ultimately, the legislature might come forward, either in particular cases or by funding a standing insurance pool. To deter, damages must be set close to the value that organized society as a whole places on convictions.

None of these other agencies, however, would step forward to cover damages without taking steps to minimize future liabilities. Whether paid by the department or out of funds allocated for the purpose by the legislature or other agencies, whoever pays the bill will insist on training and discipline of police officers to promote compliance with constitutional standards. This is exactly what happened after *Mapp*; it would happen more consistently, and more rigorously, in a system in which trial and appellate judges were less forgiving of police errors and excesses.

Ultimately, however, the police department is in the best position to ensure

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135. On the difference between prices and sanctions generally, see Robert Cooter, *Price and Sanctions*, 84 COLUM. L. REV. 1523 (1984). For an analysis of prices and sanctions in the exclusionary rule context, see Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275 (2000) (arguing that although the Court describes exclusionary rule as a deterrence-based sanction, some of its decisions in effect treat exclusion as a price that leaves the police with an option on citizens' constitutional rights).

compliance with constitutional standards. The order, therefore, should run against the department. Other arms of the government might contribute the costs of payment, but it will be quite clear where pressure needs to be directed to minimize future costs. The department trains, rewards, and disciplines the force. Sanctions on individual officers run too great a risk of deterring vigorous law enforcement. Sanctions on other arms of the government will affect police behavior less directly. Therefore, the police department should be made the locus of liability. Indeed, if the legislature allocated money for damages to the department, with the understanding that funds not needed for awards would revert to the department for law enforcement purposes, there would be a powerful incentive indeed to comply with the law.

2. Who Should Receive the Award?

Enriching guilty criminals is an unappetizing prospect. For deterrent purposes, the money can go anywhere except back to the government.[136] On the other hand, defendants must retain an incentive to file motions and must have some stake in the outcome for standing purposes.

As Bill Stuntz has pointed out, one unfortunate side-effect of the exclusionary rule is to draw fixed and scarce indigent defense resources into litigating questions collateral to guilt and innocence.[137] An obvious response would be to assign a generous award of attorney's fees in contingent suppression order cases. The standard personal injury lawyer's one-third contingency (forty percent if the award is appealed) seems reasonable. If suppression motions became self-supporting they would not drain resources away from contesting guilt. In any event awarding money to public defense is more attractive than awarding it to criminals.

The defendant is, of course, entitled to all the actual damages inflicted by the

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136. For example, Richard Murphy has recently suggested permitting prosecuting attorneys to claim punitive damages in private tort cases, arguing that familiar norms of criminal procedure favor accountable public officials over monetarily-motivated plaintiffs as ministers of public punishment. *See* Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 501-55 (1998).

137. Stuntz theorizes that because the resources available for criminal defenses are fixed and inadequate, suppression motions divert defense resources from challenging the government's proof of guilt. *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 443-44 (1997). The best response to this dilemma is to allocate adequate resources to the criminal defense function. *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 258 (1997) ("The question is not what priority indigent defense deserves versus public education or public health. Rather, the question is, given the priority of the criminal justice system relative to such other responsibilities as education and public health, what kind of indigent defense arrangement is minimally sufficient to ensure the fairness of criminal proceedings?"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1973-74 (1992) ("The Medicare system pays the market price for medical services; the military system pays the market price for soldiers and aircraft carriers; the criminal justice system should pay the market price for legal services."). If, however, suppression motions came to pay their own way, the resource trade-offs Stuntz identifies would be reduced; suppression motions might actually become sources of net revenue for indigent defense.

illegal police conduct. Although these are typically modest they are not zero. They would certainly suffice to establish standing. In addition, at the time the motion is filed and argued, the defendant does not know how the government will respond to a contingent order. So long as exclusion is a fair possibility, the defendant will have standing.

Would contingent suppression orders give defendants enough of an incentive to litigate their claims? Yes; better prison plus money than prison, period. The government might decide to drop the case rather than pay. Certainly the award gives the defense a card to play in plea negotiations.[138] Practically speaking, the decision to file a suppression motion belongs to counsel. If the motion succeeds and the government chooses not to pay, the motion is obviously in the best interests of the client. If the government chooses to pay the damages, the motion is still in the client's interests (because of the actual damages), and very much in the lawyer's interest.

The purely deterrent portion of the award (the lion's share in typical cases), less the attorney's fees, could be devoted to any worthy purpose. Restitution to crime victims and drug treatment or education come to mind. The only imperative is that the government be separated from the money and be prevented from clawing it back, by, for instance, reducing the budget for indigent defense to offset any attorney's fees paid out of the damages.

Of course, even the deterrent portions of the award could go to the defendant, but this is unnecessary and probably undesirable. Assigning the award to the defendant comports with traditional tort practice and requires no additional administrative labor. Two countervailing considerations seem weightier. In the first place, awarding the money to the defendant will raise some of the same psychological problems as the current exclusionary rule. Judges might be reluctant to find the facts or interpret the law so as to enrich a criminal, even if the criminal is thereby convicted and punished.

In the second place, judges can be counted on to positively rebel against awarding damages stemming from the unlawful search of an innocent third party to the defendant. One important, albeit speculative, advantage of the contingent exclusionary rule is that it might cause the courts to rethink the standing doctrine. That will not happen if the money goes to a wrongdoer who was not himself the victim of any illegality. So, in the end, it makes sense to establish a fund into which the deterrent portion of damage awards would be paid, and to devote the money to restitution and crime prevention.

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138. *See* Town of Newton v. Rumery, 480 U.S. 386, 398 (1987) (upholding validity of plea-bargain/release agreement in which criminal charges are reduced or dismissed in exchange for release from liability in civil rights suit).

3. How to Set Damages

Damages should be set so as to leave the government more or less indifferent between damages and exclusion. Government indifference informs the level of liquidated damages because exclusion comes very close to setting the sanction equal to the expected gain from violations.[139] True, exclusion leaves the government with the benefits of information and of dispossessing drug dealers of their contraband, and so theoretically should underdeter.[140] However, so long as searches are undertaken primarily to obtain convictions,[141] exclusion comes quite close to setting the sanction equal to the anticipated gain. Ideally, damages should be set so that the government prefers exclusion *most of the time*, thus, showing that the damages typically are slightly more onerous than suppression to compensate for the government's nonevidentiary gains from confiscation and intelligence acquisition. If the government chooses to pay in a few cases of exceptionally serious crimes, but accepts exclusion in the run-of-the-mine cases, courts would know that damages have been set correctly.

Until considerable experience with contingent orders accumulates, however, the courts will have to assess damages on some other basis. There are a variety of possible approaches. For example, courts might proceed on a wholesale basis, by ruling on minimum deterrent damages for certain types of constitutional violations, such as illegal arrests, illegal car searches, and so on. The objective of this approach would be to identify what the government expects to gain from any given illegal search or seizure *ex ante*.

The advantage of this approach would be that the government could get lucky. If damages for an illegal *Terry* stop are pegged at $10,000, the government could acquiesce in exclusion in a case like *Sibron v. New York*[142] (where the officer seized only the user's personal supply of drugs) but happily pay in a case like *United States v. Bayless*[143] where the stop turned up an enormous quantity. The downside of this approach is that often the police know *ex ante* how serious the

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139. *See* Stuntz, *supra* note 137, at 446 ("Suppression is restitutionary: the officer loses the very thing he gained from the illegal search, and no more. That largely takes care of overdeterrence.").

140. *See supra* text accompanying notes 86-87 (discussing benefits government derives from illegal searches).

141. An important caveat: exclusion will not deter illegal arrest or excessive force when these constitutional violations are motivated by sadism, racism, or a real or perceived need for immediate action to prevent incipient violence. *See* Terry v. Ohio, 392 U.S. 1, 13-15 (1968) (holding police can search suspects if they have reasonable, articulable suspicion the suspect is armed and dangerous); Levmore & Stuntz, *supra* note 81, at 491 ("The advantages of the exclusionary rule, both in terms of valuation costs and administrative efficiency, arise out of the fact that the rule involves the suppression of evidence and not the measurement of a gain or loss. This distinction points to the major limitation of the rule: it works only when the motivation for the relevant police conduct was the gathering of evidence."). In these situations only some self-contained proceeding initiated by the victim can deter future abuses. The proposed contingent exclusionary rule, however, might promote effective tort remedies by establishing as a matter of law the minimum deterrent damages for a constitutional violation.

142. 392 U.S. 40 (1968).

143. 921 F. Supp. 211 (S.D.N.Y. 1996); *see supra* note 111 and accompanying text.

case happens to be. In a murder, rape, or major narcotics case they might calculate that violating the Constitution is more than worth the likely price.

Alternatively, the contingent suppression order might set damages on a case-by-case basis. Instead of asking what the government might gain from a search of the contested type *ex ante*, the court would ask what a conviction in the instant case is worth to the government. The value of the case can be estimated by determining what the government is willing to spend to prosecute the case and to impose punishment. This would include the value of the police time that went into the investigation, the value of the time spent by the prosecutor's staff in litigating the case, and a prediction of what a likely sentence would cost the correctional bureaucracy in the event of a conviction. In a minor case with no incarceration likely, damages would be low. In a serious case with years or decades of costly prison time at issue, the damages would be correspondingly high.

Even the case-by-case approach gives the government the benefit of a consumer's surplus. The government values the conviction at least slightly, and in some cases a great deal, more than the cost of prosecuting the case and imposing the penalty. Where this consumer surplus is high, the government would opt for paying the damages. Where this surplus is marginal, the government may opt for exclusion, especially if the case can be made with untainted evidence.

Given that actual damages would have to be computed in every case anyway, the case-by-case approach makes more sense. Categorical liquidated damages would produce a regime similar to comparative reprehensibility analysis in a pure exclusionary-rule regime.[144] If the police know *ex ante* that the damages will be set close to the value of the case, no matter how serious it turns out to be *ex post*, there will be a proportionate disincentive to breaking the rules in serious cases.

However courts measure the damages, a contingent suppression ruling cannot overdeter. If the damages are set higher than the government's willingness to pay, the government simply can refuse to pay and accept the loss of the evidence. If this happens on a regular basis, it would signal that the courts have set damages too high and should revise them downward.

The magnitude of the government's consumer surplus is speculative. If the surplus turns out to be very high in typical cases, then the cost of investigating, prosecuting and sentencing in a case may undervalue its worth to the government. Willingness-to-pay damages might then seriously underdeter. If the government

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144. On the tendency of comparative reprehensibility analysis to nullify the Fourth Amendment by substituting contemporary values for those the founders expressed in the text, see Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 18 (1987) ("Such a test could give judges a 'chancellor's foot veto' over the exclusionary rule.") (footnote omitted); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1045-46 (1974) (advocating exception for extremely serious crimes, but cautioning that case-by-case comparisons of crime and police misconduct would amount to "almost an open invitation to nullification at the trial court level").

routinely pays the damages, judges would know that their estimate of what the case is worth would need to be revised upward.

If government indifference measures the damages, why bother with damages as an alternative to suppression? There are two basic reasons. The first and most important is that the contingent suppression order comes to grips with the problem of Fourth Amendment fraud. Judges can treat police perjury for what it is, without assuming responsibility for the release of the guilty. That responsibility would lie where it belongs–with cities and police departments which fail to train and discipline their officers to comply with constitutional standards. Whether the voters decide they hate damages or lost convictions more will be left to politically accountable decision-makers. If the courts, however, insist that something really is going to happen when the police break the law, there will be a lot fewer instances in which the law is broken.

Likewise on appeal, judges reviewing a contingent suppression order would know that expanding constitutional rights would not mean the release of dangerous felons, as reported on the front page the next morning. Instead, the courts could adjudicate the appropriate scope of substantive constitutional rights without the psychological and political pressure of knowing that a ruling on behalf of liberty automatically means the release of an offender.

In the second place, the contingent suppression order allows the government the benefit of the consumer's surplus. Where the benefit of prosecuting and punishing an exceptionally heinous crime greatly exceeds the financial cost of prosecution and imprisonment, the government could pay the damages and retain the surplus value of the conviction. Presumably this surplus is high in very few cases; otherwise, we would expect government to devote larger sums to police, prosecutors, and prisons. If this is so, then *ex ante* the government would have no incentive to violate the Constitution–especially with mandatory exclusion as a backup remedy for bad faith searches. As indicated before, however, the size of the consumer's surplus is speculative.

The completed search cannot be undone. If a monetary award would cause the government to refrain from an identical search *ex ante*, deterrence would be achieved without unjustly enriching the felon through the nullification of the charge. Thus, future illegal searches would be deterred, but fortuitously big catches would not be lost to the suppression remedy.

4. Appellate Review

Appellate practice with contingent suppression orders would track current practice in suppression cases. If the defendant loses the suppression motion, the trial would proceed with the challenged evidence. If the defendant loses the trial, and prevails in appealing the Fourth Amendment ruling, the appellate court would then have the option of reversing contingent on the failure to pay damages. If those depended on facts, the case could be remanded for a hearing.

If the government lost the suppression motion, and elected to pay the damages and proceed with trial, the government could appeal the merits of the trial court's ruling at any time. The contingent order would be entirely collateral, and the money could be held in escrow until the appeal is resolved. If the government chose to accept exclusion, the order would be appealable before trial as under existing practice.[145]

There might be, especially initially, some ticklish questions about appeals over the amount of the damages. Suppose the defense wins the motion at trial, but complains that the damages are set too low to deter. If the government pays the damages, and the defendant's complaint about the amount is deemed not immediately appealable, an appellate court accepting the defendant's position could then set higher damages and give the government the option of payment or retrial without the tainted evidence. If the government, by contrast, protests the amount of the damages set by the trial court, interlocutory appeal should be allowed. Otherwise, the government might prevail on appeal but only after trying the case without the tainted evidence, with the consequent imposition of the double jeopardy bar.

IV. SPECIFIC APPLICATIONS

It is an unlovely truth, but a truth nonetheless, that remedies define rights rather than the reverse.[146] Courts that shrink from imposing an unpopular remedy will translate hostility to the remedy into narrow interpretations of the substantive rights. By contrast, a politically acceptable remedy can lead to generous definitions of civil liberties. This Part argues that in many contexts the availability of the contingent suppression motion might make courts more receptive to substantive claims of individual liberty.

A. Fourth Amendment Claims

The imposition of the exclusionary rule on the states in 1961 did more than force the states into compliance with federal Fourth Amendment standards. It also caused the Supreme Court to modify those standards, by relaxing the warrant and probable cause requirements, and by excluding many police tactics from Fourth

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145. *See* WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 27.3, at 1149 (2d ed. 1992) ("Most jurisdictions do allow a prosecution appeal from one pretrial interlocutory order — the granting of a pretrial motion to suppress evidence.").

146. It is not surprising that Holmes, who took the bad man's view of the law, insisted on the exclusionary rule. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Given the weakness of the tort remedy, admissibility "reduces the Fourth Amendment to a form of words." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.).

Amendment scrutiny entirely. This process began even during the days of the Warren Court;[147] it has proceeded more vigorously ever since.[148]

If contingent suppression motions became standard remedies for Fourth Amendment violations, this process might be arrested and even reversed. Judges who know that rigorous interpretations of the Fourth Amendment need not free the guilty might be more receptive to claims against the government. For example, combing through a homeowner's garbage might easily be described as a "search,"[149] just as hectoring a bus passenger with no desire to leave the bus might easily be described as a "seizure."[150] Justices knowing that bringing such police tactics under the Fourth Amendment would require suppression of the fruits might have come out differently if the escape of the guilty were contingent rather than automatic. Likewise, courts might be less willing to find "reasonable suspicion" from the mere fact that the suspect attempted to avoid the police in a "high crime neighborhood"[151] if they could penalize the police for a successful roust without also costing the public a just conviction.

Moreover, the contingent suppression order might encourage the Supreme Court or state supreme courts to reconsider well-established exceptions to the exclusionary rule itself. Suppose, for instance, the government relies on the standing, impeachment, or inevitable discovery exception. Plainly the government is attempting to profit from unconstitutional conduct, when rational deterrence theory counsels penalizing rather than rewarding illegal conduct.[152] Might not the proper

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147. *See, e.g.*, Alderman v. United States, 394 U.S. 165, 174 (1969) (rejecting target standing to invoke exclusionary rule); Terry v. Ohio, 392 U.S. 1, 20-22 (1968) (Warren, C.J.) (upholding as reasonable detention for investigation supported by facts falling short of probable cause); Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) (holding building inspections comply with Fourth Amendment when supported by warrant not satisfying traditional understanding of probable cause); Hoffa v. United States, 385 U.S. 293, 302-03 (1966) (planting spy in suspect's circle of friends is not a "search" and so not regulated by Fourth Amendment).

148. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 574-76 (1991) (holding no warrant required to search containers found in automobile even when probable cause exists only to search specific container, not automobile generally); Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (holding test of probable cause is whether totality of circumstances shows fair probability that evidence of contraband will be found in place to be searched); United States v. Miller, 425 U.S. 435, 440 (1976) (holding no reasonable expectation of privacy in financial transactions disclosed to suspect's bank). For overviews of how the Court has curtailed Fourth Amendment rights, see, e.g., Davies, *supra* note 50, at 141-43 (stating protection under Fourth Amendment has been weakened by judicial decisions over past twenty-five years); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 257-81 (1984) (providing history of development of Fourth Amendment law).

149. *Cf.* California v. Greenwood, 486 U.S. 35, 40-42 (1988) (holding police sifting of suspect's garbage not a "search").

150. *Cf.* Florida v. Bostick, 501 U.S. 429, 437 (1991) (holding no seizure under *Terry* as reasonable person would feel free to disregard police).

151. Presence in a "high crime" area plus "evasive" or "furtive" behavior are often held sufficient to support a stop under *Terry*. *See* WAYNE LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(f), at 190-91 n.254 (3d ed. 1996) (collecting cases); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994) (stating police disproportionately stop and frisk minorities who may live in high crime areas and often have reason to avoid the police).

152. *See, e.g.*, WAYNE LAFAVE, 5 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(h) (3d ed. 1996) (defending target standing and characterizing *Payner* decision as "almost beyond belief"); Amsterdam,

course be to abolish the exceptions altogether in favor of a suppression order the government could avoid completely by paying damages? Or, at the least, to impose some monetary penalty on the use of tainted evidence for such purposes as impeachment?

The standing exception poses some nice questions in this regard, because damages properly belong to the search victim rather than the defendant when the two are not the same. This is undoubtedly correct with respect to compensatory damages, but if the theory of liquidated or punitive damages is to deter rather than to compensate, and if it is practically implausible for the right-holder to prosecute a claim for such deterrent relief, then the defendant satisfies the traditional requirements for third party standing.[153] Judges and commentators have long recognized that the standing doctrine undermines deterrence.[154] This solitary holdover from the days of *Boyd* remains on the book solely because of the exclusionary rule's unattractiveness, not on account of any fair assessment of deterrence. Perhaps, then, the prospect of contingent rather than mandatory exclusion might cause judges to reconsider plugging this obvious hole in the remedial scheme.

The contingent suppression order is not a panacea. Because the predicate for such an order is the existing exclusionary rule, a contingent order could not offer any help toward the problems of illegal arrest and excessive force. That arrest without probable cause or police brutality neither bars prosecution nor requires the suppression of evidence lawfully obtained is well-established.[155] Accordingly, in such cases there is no constitutional predicate for a contingent order.

In one important category of Fourth Amendment cases, the contingent exclusion-

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supra note 69, at 433 ("[T]he Supreme Court's 'standing' rules constitute an incitement to the police to conduct unconstitutional searches against small fish in order to catch big ones."); John M. Burkhoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 176-77 (1979) (stating the prospect that victim of search may suppress evidence insufficient to deter police interested in using evidence against other targets).

153. *Cf.* Craig v. Boren, 429 U.S. 190, 195-97 (1976) (allowing brewers to raise equal protection rights of consumers); Barrows v. Jackson, 346 U.S. 249, 257-58 (1953) (allowing white seller to invoke equal protection rights of black buyer while defending action on racially restrictive covenant); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940) (allowing competitors of license applicant to raise claims of listening public).

154. *See, e.g.*, People v. Martin, 290 P.2d 855, 857 (Cal. 1955) (Traynor, J.) (recognizing standing on part of target of investigation to suppress evidence obtained in violation of Fourth Amendment rights of third parties); Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983) (suggesting deterrent effect of Fourth Amendment would be greater if the Court viewed Fourth Amendment as encompassing individual and collective rights); Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980) (examining operation of standing requirement as a limitation upon exclusionary rule).

155. *See generally* New York v. Harris, 495 U.S. 14, 17 (1990) (holding warrantless entry to arrest did not taint statement later made by suspect); INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (holding illegal arrest did not bar deportation proceedings); United States v. Crews, 445 U.S. 463, 472-73 (1980) (holding illegal arrest did not require excluding in-court identification of defendant); Frisbie v. Collins, 342 U.S. 519, 522 (1952) (holding illegal arrest did not bar prosecution); Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding kidnapping of suspect to answer charges did not bar prosecution).

ary rule should have no application. When the government offers tainted evidence in a forfeiture proceeding, whether civil or criminal, the government would be willing to pay damages rather than accept suppression only if the damages were less than the value of the property in dispute. When it is easy to calculate the government's gain from the illegal seizure, there is no need for the difficult guesswork a contingent suppression order requires. Excluding the evidence equalizes the sanction to the anticipated gain and should, therefore, remain the appropriate remedy.

B. Fifth Amendment Claims

The Fifth Amendment privilege forbids compelling a person to be a witness against himself at a criminal trial. Long-standing precedent reads "witness" as "declarant," so that the privilege forbids admitting a statement against the accused whether the statement is compelled at the criminal trial or in collateral proceedings.[156] Well-established precedent also holds that compelled admissions of crime do not violate the privilege if the compelled statements are immunized against future use.[157] A state that compels testimony under a grant of immunity need not first secure immunity orders from all other sovereigns who might prosecute the witness, but other states or the federal government may not use the compelled statements against the witness in future prosecutions.[158] When the federal government or one of the states compels testimony that can expose the witness to criminal liability only in foreign countries, the privilege does not stand in the way.[159] When immunity is granted, however, statements obtained by formal process, as distinct from those obtained by violating *Miranda*, may not be received to impeach a defendant's subsequent contradictory trial testimony.[160]

These settled principles point to a constitutional right against the use, rather than the compulsion, of testimonial admissions.[161] Thus, a court could not constitutionally impose a deterrence-based contingent suppression order on evidence tainted

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156. *See generally* Arndstein v. McCarthy, 254 U.S. 71, 73 (1920) (civil proceedings); Bram v. United States, 168 U.S. 532, 550-51 (1897) (police interrogation); ICC v. Brimson, 154 U.S. 447, 479 (1894) (administrative proceedings); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (grand jury proceedings); Marbury v. Madison, 5 U.S. 140 (1803) (civil litigation).

157. *See generally* Kastigar v. United States, 406 U.S. 441, 449-59 (1972) (holding compelled self-incriminating testimony constitutional so long as a witness is granted use-plus-fruits immunity). *Counselman* held in 1892 that transactional immunity could overcome the privilege. *See supra* note 156.

158. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964) (holding constitutional privilege against self-incrimination bars the use of statements made under grant of immunity in any state or federal prosecution).

159. *See* United States v. Balsys, 524 U.S. 666, 672-74 (1998) (holding use of compelled statements in foreign prosecution is outside the scope of constitutional privilege against self-incrimination).

160. *See* New Jersey v. Portash, 440 U.S. 450, 459-60 (1979) (holding immunized grand jury testimony could not be used to impeach defendant at trial).

161. Thus it is generally held that there is no liability under 42 U.S.C. § 1983 for questioning in violation of *Miranda* when no statements are ever used in evidence against the plaintiff. *See* Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV.

by Fifth Amendment compulsion, as distinct from unreasonable searches or seizures under the Fourth Amendment.

By contrast, the Supreme Court has subjected *Miranda*-tainted evidence to the same balancing test that governs fruits of Fourth Amendment violations.[162] Arguably, a court could enter an order suppressing the fruits of a *Miranda* violation contingent on the failure to pay damages. On the other hand, it is usually held that questioning in violation of *Miranda* does not give rise to a claim for damages.[163] The constitutional violation (or quasi-constitutional violation, depending on what line of *Miranda* cases you favor)[164] occurs with the use of compelled statements, not with attempted compulsion through interrogation that defies the *Miranda* rules. Thus, it seems likely that a court could not justify a contingent suppression order in the *Miranda* context, because such a court would forgo the opportunity to prevent the constitutional violation in the first place. As between preventing the violation, and paying damages for it in advance, the legally correct course is obvious.

C. Sixth Amendment Claims

The Sixth Amendment confrontation clause bars some hearsay statements, not because of how they were obtained, but because they are deemed unreliable.[165] Evidence that would more likely cause an erroneous than a justified conviction

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417, 439-54 (1994) (stating courts generally find that Fifth Amendment is violated only when compelled statement is used against a defendant at trial).

162. *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984) (recognizing "public safety" exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (upholding admissibility of a witness' testimony when statement obtained in violation of *Miranda* led police to identify the witness); Harris v. New York, 401 U.S. 222, 224-26 (1971) (holding statement obtained in violation of *Miranda* may be admitted to impeach defendant's testimony).

163. *See* Klein, *supra* note 161, at 448 ("The Fifth Amendment violation does not occur until trial, so there are no damages arising from the interrogation itself. Once at the trial stage, there are still no damages because the harmless error ruling means that the plaintiff would have been convicted despite the admission of the confession.").

164. *Compare* cases *supra* note 162 *with* Withrow v. Williams, 507 U.S. 680, 691-95 (1993) (holding *Miranda* claims, unlike Fourth Amendment claims, cognizable on federal habeas); Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (holding invocation of *Miranda* right to counsel bars subsequent interrogation without counsel present even if suspect consults with counsel before police reapproach the suspect); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding waiver of *Miranda* rights by suspect who previously invoked *Miranda* right to counsel must result from defendant-initiated communication). On the schizophrenia in the cases, see JOSEPH GRANO, CONFESSIONS, TRUTH AND THE LAW 218 (1993) ("The current situation is doctrinally unstable, with two lines of irreconcilable cases coexisting to give the Court a choice between allowing or disallowing the police to have the necessary tools for effective interrogation."). In *Dickerson v. United States*, 120 S. Ct. 2326 (2000), the Supreme Court reaffirmed *Miranda* as a constitutional decision without expressly repudiating the prophylactic-rules case.

165. *See, e.g.*, White v. Illinois, 502 U.S. 346, 356 (1994) ("The preference for live testimony . . . is because of the importance of cross-examination, 'the greatest legal engine ever invented for the discovery of truth.' Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence. But where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.") (citation omitted); Pointer v. Texas, 380 U.S. 400, 404 (1965) ("And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.").

should be excluded to preserve the reliability of the trial process. Accordingly, the contingent exclusionary remedy would have no place in confrontation clause jurisprudence. The same analysis plainly applies to ineffective assistance of counsel claims under *Strickland v. Washington*.[166] The remedy for errors by counsel that undermine the reliability of the trial is a new, reliable trial, not damages designed to deter the unreliable trial of other defendants. The prejudice prong of *Strickland* implicitly requires retrial as the appropriate remedy for violations.[167]

Violations of the *Massiah*[168] and *Wade*[169] doctrines present somewhat different considerations. The *Massiah* bar on post-indictment questioning might rest on reliability; without counsel, the defendant may make an admission that is inaccurate or incomplete, to his prejudice at trial. If this rationale is sound, harmless error analysis is appropriate in a *Massiah* case, but a contingent suppression order is not. On the other hand, if the *Massiah* rule is based on fair play, rather than reliability, the remedy should aim to deter and a contingent suppression order might be appropriate. The Supreme Court has clearly rejected the reliability theory of *Massiah*,[170] and Professor Tomkovicz, the leading academic defender of *Massiah*, endorses a fair play account.[171]

Wade, however, presents the problem of second-best evidence. Counsel at a post-indictment lineup does promote reliability, but a lineup conducted absent counsel is not *per se* unreliable. It just is not as reliable as it might have been with counsel present. Throwing out the lineup seems disproportionate, let alone barring the eyewitness's in-court identification at trial. Yet, something ought to happen to encourage the police to make the next lineup as reliable as possible, rather than just minimally probative of guilt. Whenever exclusion is authorized for deterrent reasons, a good case might be made for a contingent suppression order. As the next section suggests, lineups are a very good place to start with the problem of second-best evidence.

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166. 466 U.S. 668 (1984).

167. Under *Strickland*, defense counsel's unprofessional errors must be shown to have prejudiced the defendant. *Id.* at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

168. Massiah v. United States, 377 U.S. 201, 205-06 (1964) (holding statements elicited from indicted defendant, in absence of counsel and without waiver, could not be used constitutionally in trial).

169. United States v. Wade, 388 U.S. 218, 223-43 (1967) (holding in-court identification by witness to whom accused was exhibited before trial, in absence of counsel, must be excluded unless evidence has independent origin or harmless error).

170. *See* McCleskey v. Zant, 499 U.S. 467, 502 (1991) (holding actual-innocence exception to cause-and-prejudice standard for raising claim on federal habeas that was not presented to state court is necessary to a claimed *Massiah* violation: "The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination."); Michigan v. Harvey, 494 U.S. 344, 349-53 (1990) (holding statement obtained by police in violation of Sixth Amendment right to counsel admissible to impeach defendant's testimony).

171. *See* James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 766 (1989).

D. Due Process Claims

1. Identification Evidence

Current constitutional doctrine regulating identification imposes minimal constraints on the single biggest cause of false convictions. The Warren Court relied on the Sixth Amendment to require counsel at post-indictment lineups. The Burger Court, however, held that the right to counsel does not attach before formal accusation,[172] so that by conducting the lineup prior to filing charges, the prosecution routinely can circumvent the *Wade* rule. Moreover, the Burger Court held that even after indictment, a photo identification, as distinct from a corporeal lineup, is not a critical stage of the proceedings at which defense counsel has the right to appear.[173]

Under *Stovall v. Denno*,[174] due process requires excluding identification evidence when the police employed an unnecessarily suggestive procedure and when this procedure made erroneous identification very likely.[175] The test is rarely met, and when it is, the courts still may admit an in-court identification, rendered under the most suggestive circumstances imaginable, as independent of the previous suggestive lineup or show-up.[176] This embarrassing state of affairs is largely attributable to the all-or-nothing remedial dilemma facing a court after a needlessly suggestive lineup, photo spread, or street confrontation. The evidence could have been better–but is it so bad that it has to be thrown out?

The contingent suppression order offers a way out of this dilemma. If the police stage a lineup or photo spread that is needlessly suggestive under the first prong of *Stovall*, that alone should establish a due process violation. What possible justification could there be for unnecessary suggestiveness?

The remedy, however, should be a contingent suppression order. Admitting the lineup evidence subjects the defendant to a trial that is not as reliable as it might easily have been. In a very real sense, that violates due process even when it cannot be shown that the result is an unjust conviction. Certainly in future cases we want to deter unnecessary suggestiveness. Here the possibility of a remedy other than exclusion or nothing strongly suggests broadening the substantive right to eliminate the now-required showing of irreparable prejudice. Practically speaking, the in-court identification probably derives from the lineup or show-up. Barring proof of both the gratuitously suggestive pretrial identification procedure and its subsequent in-court fruit, contingent on the failure to pay damages, would enable judges to send a message about unconscionable risks in the identification process, without scuttling cases against suspects who may very well be guilty as charged.

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172. *See* Kirby v. Illinois, 406 U.S. 682, 688-89 (1972).
173. *See* United States v. Ash, 413 U.S. 300, 317-18 (1973).
174. 388 U.S. 293 (1967).
175. *See id.* at 301-302.
176. *See, e.g.*, WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 7.4(f) (2d ed. 1992).

2. Failure to Collect Exculpatory Evidence

Arizona v. Youngblood[177] offers another example of the second-best evidence problem.[178] In that case, the police failed to preserve a sexual assault victim's underclothes so as to enable a test that could have conclusively exculpated the accused. The Court held that there was no constitutional violation, because the police have their own reasons to fully develop the evidence. This sort of Pollyannaism is a little much even from appellate judges.[179] Surely, a prominent factor in the decision is the difficulty of devising a remedy that does not result in the loss of a case that might, so far as the sub-optimally developed evidence shows, be perfectly justified.

Given a contingent suppression alternative, one might envision a different result. Due process surely requires reliable trials, and a reliable trial cannot be had after an unreliable investigation. However, as construed in *Youngblood*, *Stovall* and like cases, a trial is unreliable only when it probably produced an erroneous conviction. It would be more reasonable to say that the defendant's due process rights are violated whenever the trial runs an easily avoidable risk of error, but that the remedy for violations should be damages rather than immunity from prosecution. Only in this way can future needlessly unreliable trials be avoided.

When the police fail to gather potentially exculpatory evidence, *all the other evidence is made less reliable than it should be*. The evidence against individuals subsequently exonerated by DNA testing looked very strong indeed. After the DNA testing, however, we know that the other evidence pointed in the wrong direction. Results of DNA testing are not encouraging regarding the reliability of police investigations in which such evidence is not available; nationwide, about a quarter of the conclusive DNA tests exonerate the suspect.[180]

Thus, when the police fail to gather exculpatory evidence, other evidence should be subject to a contingent suppression order founded on due process. Damages here should be set lower than in the Fourth Amendment context, because we want the trial to go forward. We cannot change the past, and when the evidence we do

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177. 488 U.S. 51 (1988).

178. *See id.* at 58.

179. Youngblood was charged with abducting a ten-year old boy from a church carnival and sexually assaulting him. In such a case the police will be under intense pressure to clear the crime with an arrest. Once they have an identification, physical evidence that exonerates the suspect puts them back to square one. Youngblood, who is black, apparently homosexual, apparently emotionally disturbed, and was poor enough to be represented by public defenders, sounds like one of the usual suspects unlucky enough to be fingered by eyewitness testimony. It turns out that new DNA testing techniques made it possible to test the limited quantity of evidence the police had preserved, and that testing with these techniques established Youngblood's innocence. See Tim O'Brien, *Youngblood's Guilt Seemed Clear—But He Was Innocent*, TUCSON CITIZEN, Sept. 14, 2000, *available at* 2000 WL 22162235.

180. *See* Peter Neufeld & Barry Scheck, *Commentary, in* CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii-xxxi (1996).

have points strongly toward the suspect's guilt, he should stand trial. However, we can change the future, and we want future trials to be as reliable as practical.

E. Equal Protection Claims

American criminal justice has always been scarred by racial prejudice. Yet, between *Strauder v. West Virginia*[181] and *Batson v. Kentucky*,[182] the Supreme Court's only reliance on equal protection in criminal justice focused on economic, rather than racial, discrimination.[183] In *Batson*, the Court overruled *Swain v. Alabama*[184] and held that an inference of racial discrimination could be drawn from the prosecution's exercise of peremptory challenges in a single case. The *Batson* majority approved a Title VII-type burden-shifting procedure to test such claims of discrimination.

More recently, in *United States v. Armstrong*,[185] the Court reverted to a traditional *Washington v. Davis*[186] analysis to test claims that prosecutors had discriminated against blacks in the exercise of charging discretion. The most likely explanation for the different approaches to peremptory challenges and charge selection cases lies in the overwhelming empirical record of discrimination in jury selection compiled during the years between *Swain* and *Batson*.[187] The justices, evidently, were unwilling to assume that pretrial charging decisions were as subject to racial prejudice as tactical decisions about jury strikes in the heat of battle, even though the same personnel make both types of decisions.

Lower courts have followed *Armstrong* rather than *Batson* in cases involving

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181. 100 U.S. 303, 308 (1879) (holding *de jure* exclusion of blacks from jury service violates Equal Protection Clause of Fourteenth Amendment).

182. 476 U.S. 79, 96 (1986) (holding discriminatory exercise of peremptory challenges by prosecutor can be shown in single case, and, when shown, violates equal protection).

183. *See* Mayer v. Chicago, 404 U.S. 189, 193-94 (1971) (holding Equal Protection Clause requires furnishing indigent defendants adequate record to appeal even in minor cases); Douglas v. California, 372 U.S. 353, 356-57 (1963) (holding equal protection requires appointing counsel to represent indigent defendants during first appeal as of right); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding when right to appeal depends on availability of transcript of trial, refusal to provide free transcripts to indigent defendants violates equal protection). In this isolated branch of equal protection jurisprudence, poverty defines a suspect class when the state denies access to appellate review in criminal cases on the basis of means. The state, however, remains perfectly free to charge for other public services, such as higher education, health care, or transportation.

184. 380 U.S. 202, 220-21 (1965) (holding no violation of equal protection when peremptory strike is used on basis of race).

185. 517 U.S. 456, 465-66 (1996) (holding threshold evidence showing government failed to prosecute similarly situated suspects of other races required to entitle defendant to discovery).

186. 426 U.S. 229, 239 (1976) (holding law not unconstitutional on sole basis of racially disproportionate impact).

187. *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1622 (1985) ("[B]oth empirical investigations and judicial observations show the overwhelmingly frequent use of peremptory challenges to rid the jury of black jurors when the defendant is black.") (footnote omitted). On the difficulty of proving discrimination under *Swain*, see, e.g., McCray v. Abrams, 750 F.2d 1113, 1121 (2d Cir. 1984). For a depressing review of the cases, see James O. Pearson, Jr., Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14 (1977).

challenges to *police* decisions to stop, search, and arrest.[188] The empirical evidence on police discrimination, however, suggests classifying police decisions under *Batson*.[189] While there is, perhaps, less empirical evidence on police investigations than on peremptory challenges, the available evidence strongly supports an inference of widespread discrimination.[190]

Why then have the judges been reluctant to adopt a burden-shifting analysis in search and arrest cases? The most likely explanation is that courts are reluctant to release a guilty black defendant simply because guilty white defendants are not in court. After all, most crime is intraracial, so that freeing black felons does no service to the black community.[191] The contingent suppression motion offers judges skeptical of police motives but unwilling to release the guilty an important option. The evidence obtained by a racially motivated search or arrest would be

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188. *See* United States v. Avery, 128 F.3d 974, 986 (6th Cir. 1997) (holding rarely will disparate impact statistics conclusively demonstrate equal protection violation); United States v. Bullock, 94 F.3d 896, 899 (4th Cir. 1996) (holding allegation of race-based drug courier profile as motivation of stop not enough to prove equal protection violation); United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) (holding defendant failed to prove equal protection violation without establishing statute had discriminatory effect or enforcement was motivated by discriminatory purpose). *But see* United States v. Jennings, 985 F.2d 562, No. 91-5942, 1993 WL 5927 at *4 (6th Cir. Jan. 13, 1993) (unpublished decision) (adopting burden-shift to government once defendant shows police stop based on race).

189. *See* Harris, *supra* note 151 (discussing evidence that stop and frisks are applied disproportionately to the poor, African-Americans, and Hispanic-Americans); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344-354 (1998) (discussing racial impact as important factor that should be used in determining constitutionality of seizures).

190. *See, e.g.*, Carl J. Schifferle, *After* Whren v. United States: *Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law*, 2 MICH. L. & POL'Y REV. 159, 165-66 (1997):

> Strong evidence exists that minority motorists are the predominant target of these pretextual traffic stops. For example, a trial judge in New Jersey recently suppressed evidence against nineteen Black defendants after finding that state troopers had targeted Black motorists on the New Jersey Turnpike for a disproportionate number of stops. Elsewhere, the American Civil Liberties Union alleged in a federal lawsuit that nearly seventy-three percent of all searches conducted by Maryland State Police along a stretch of I-95 between January 1995 and September 1996 were performed on Black motorists; yet Blacks constitute only sixteen percent of drivers on that segment of highway. In Florida, the Orlando Sentinel Tribune newspaper reviewed videotapes of over 1,000 traffic stops recorded by dash-mounted cameras in patrol cars. Almost seventy percent of those stops involved Black or Hispanic motorists, even though on that particular stretch of roadway only about five percent of drivers are dark-skinned. The newspaper also reported that on average the stops of Black and Hispanic drivers lasted more than twice as long as the stops of White drivers. Finally, an earlier field study of three police departments in Southern California concluded that Blacks were substantially more likely to be arrested for traffic offenses than Whites; in two of the departments, Blacks were fourteen times more likely to be arrested.

Id. (footnotes omitted).

191. *See, e.g.*, Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1269 (1994) ("If it is true that blacks as a class are disproportionately *victimized* by the conduct punished by the statute at issue, then it follows that blacks as a class may be *helped* by measures reasonably thought to discourage such conduct.") (footnote omitted) (emphasis in original).

suppressed, contingent upon a payment to the defendant sufficient to compensate for, and to deter future, violations of equal protection rights.

What about discrimination in jury selection and grand jury selection? Currently, the remedy for a *Batson* violation at trial is to strike the venire and start jury selection over; this would clearly remain the appropriate remedy at the trial level. On appeal, however, the current remedy is reversal and retrial. The purpose of retrial *theoretically* is deterrence, and this explanation is convincing in the grand jury context.[192] It is less than completely satisfying in the *Batson* context.[193]

The empirical evidence tends to show that white jurors are more likely than black jurors to convict black defendants.[194] This difference might be due to experiences and worldviews that are in no way racially invidious, but it does mean that when discrimination in jury selection drives blacks off the jury of a black defendant, the result of the trial might have been affected. On the other hand, the courts would instantly reject the claim that if nondiscriminatory jury selection produced by coincidence a disproportionately or even exclusively white jury for the trial of a black defendant, the trial was necessarily not "impartial" under the Sixth Amendment.

The fact that defendants challenging discrimination in grand or petit jury selection raise the equal protection rights of prospective jurors, rather than their own, should not bar the possibility of ordering retrial contingent on the failure to pay damages to the defendant. The defendant's damages should be sufficient to deter; prospective jurors might pursue compensation in their own suits. If there is no reason to suspect that the outcome of the trial was affected, as is plainly the case with discrimination in grand jury selection, a contingent reversal might well be an option on appeal.

With respect to the petit jury, however, it seems plausible to believe that defendants may be prejudiced in a legal sense when minority group members are excluded from the panel.[195] Ignoring racial differences is counterfactual, while officially treating race as a proxy for fairness appears invidious. Strong arguments are made on both sides of the debate over color-blind or racially conscious

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192. *See* Meltzer, *supra* note 42, at 253-266 (explaining reversal in grand jury discrimination cases on deterrence grounds).

193. As Professor Muller has argued in an excellent article, the assumption that race does not make a juror partial to one side or another in a criminal case implies that *Batson* errors are always harmless to the accused. He would solve the paradox by recharacterizing the *Batson* rule as a reliability-based component of the Sixth Amendment right to an impartial jury, and admit that race can be a proxy for bias in favor of the prosecution or defense. Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 131-48 (1996).

194. *See* Johnson, *supra* note 187, at 1620-22.

195. *See id.* at 1625-51 (describing empirical evidence that white jurors are less sympathetic to black defendants than to white defendants); *see also* Muller, *supra* note 193, at 132-38 (describing verdict as product of interpretation rather than scientific method, and arguing that racial perspectives influence interpretation so that race-based exclusion of jurors prejudices the defense).

constitutional doctrine.[196] Retrial as the remedy for *Batson* errors dodges this dilemma, because retrial can be justified either as a color-conscious remedy that secures the accused a fair trial or as a deterrent to future violations of color-blind equal protection rights. A contingent reversal in a *Batson* case would implicitly approve a color-blind reading of *Batson*, because contingent remedies are based exclusively on deterrence.

To reject contingent remedies in *Batson* cases, however, would not entail any position on the color-blind/race-conscious debate, precisely because the existing reversal remedy can be justified from either perspective. Contingent orders in Fourth Amendment cases make sense because the understandable reluctance to free the guilty leads to underenforcement of constitutional rights. By contrast, when appellate courts reverse under *Batson*, they do not free the guilty but instead remand for a new trial. The patently guilty will be convicted on retrial, however the jury is chosen. There is therefore less of a risk that appellate judges will underenforce *Batson* in the same way that they underenforce the Fourth Amendment. The choice of remedies, in this instance, can be made without resolving the difficult issue of color-blindness versus race-consciousness. If it ain't broke, don't fix it.

V. CONCLUSION

The debate over the exclusionary rule has gone on so long because important values support both sides. Defenders of exclusion admit that the rule has real costs,[197] that the escape of the manifestly guilty is disturbing even if it is justifiable,[198] that the rule does nothing to compensate guilty or innocent victims of illegal searches and seizures,[199] and that the prospect of freeing the guilty has distorted the fact-finding at suppression hearings.[200] Critics of exclusion admit that existing tort remedies are ineffectual,[201] and that the valuation problem[202] and the

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196. Randall Kennedy has delivered a careful defense of color-blindness in criminal justice, but his views have been vigorously challenged. *Compare* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) *with* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998), *and* Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619 (1997).

197. *See* Dripps, *supra* note 37, at 919 ("[E]xclusion often neutralizes evidence the police might have seized constitutionally.").

198. *See* People v. Cahan, 282 P.2d 905, 910 (Cal. 1955) (arguing exclusionary rule "fails to protect society from known criminals who should not be left at large").

199. *See id.* (arguing exclusion of evidence cannot be justified as compensation for the constitutional violation).

200. *See* Kamisar, *supra* note 144, at 18 ("'[I]t is hard indeed for any judge to set apart the question of guilt or innocence of a particular defendant and focus solely upon the procedural aspects of the case . . . .' ") (footnote omitted).

201. *See supra* note 90.

202. *See supra* text accompanying note 80.

political incentives problem[203] raise difficult obstacles to replacing the exclusionary rule. The force of these opposed considerations has driven distinguished jurists into changes of heart about the exclusionary rule.

For example, in 1949, Justice Black declared that the exclusionary rule is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[204] In 1961[205] and again in 1965,[206] he described exclusion as constitutionally required by the privilege against self-incrimination. In 1969, he turned to the view that exclusion has "one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police."[207]

In the 1942 *Gonzales* case,[208] Roger Traynor wrote a strong opinion rejecting the exclusionary rule in favor of tort remedies. However, years of experience convinced him that tort remedies were ineffectual, leading him to the conclusion that the exclusionary rule, despite its defects, is indispensable.[209] Earl Warren argued *Gonzales* for the state, but joined the majority in *Mapp v. Ohio*. Seven years after *Mapp*, in *Terry v. Ohio*, Warren ruefully recounted the various limitations of suppression, although he never suggested abandoning the exclusionary rule.[210] The ambivalence of strong minds reflects the weight of competing values.

The contingent exclusionary rule incorporates some of the strong points of both exclusion and damages. A contingent suppression order bypasses both juries and legislatures, comes with a built-in measure of damages in the form of government indifference between exclusion and the damages, and gives judges the option of penalizing police misconduct without freeing the guilty. The debate has been going on, in pretty much the same terms, for the last seven decades. Perhaps when that span of time has passed again, those who work with constitutional remedies will have borrowed Webster's toast for their purposes: Exclusion *and* damages, now and forever, one and inseparable.

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203. *See* SCHLESINGER, *supra* note 43, at 79 ("The tort remedy with government liability for damages may face substantial political opposition in the form of the unwillingness of taxpayers to assume the burden and that opposition will be especially strong when it is perceived that damages are paid to disreputable persons or even formerly convicted felons.") (footnote omitted).

204. Wolf v. Colorado, 338 U.S. 25, 40 (1949) (Black, J., concurring).

205. Mapp v. Ohio, 367 U.S. 643, 666 (1961) (Black, J., concurring).

206. Linkletter v. Walker, 381 U.S. 618, 645 (1965) (Black, J., dissenting).

207. Kaufman v. United States, 394 U.S. 217, 238 (1969) (Black, J., dissenting).

208. People v. Gonzales, 124 P.2d 44 (Cal. 1942).

209. *See* Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22; *see generally* People v. Cahan, 282 P.2d 905 (Cal. 1955).

210. *See* Terry v. Ohio, 392 U.S. 1, 13-15 (1968). Likewise, I continue to support the existing exclusionary rule as superior to any politically plausible alternative remedial scheme. I do not believe that anything in this paper contradicts arguments I have previously advanced about the exclusionary rule compared to tort remedies. If, indeed, my thinking (or, more likely, my attitude) has changed, I hope the examples cited in the text help to excuse any inconsistency.

VI. POSTSCRIPT

In his comment on this Article, Professor Thomas displays, once again, the rare combination of acuity and grace that is his trademark. I think he accurately identifies the potential advantages and disadvantages of contingent suppression orders, and readers can judge for themselves whether the potential for reform justifies the risks. Those who conclude that the difficulty of evaluating damages provides a conclusive reason for rejecting the contingent exclusionary rule, however, ought to recognize that the valuation problem attends *any* system of tort remedies, whether statutory or constitutional. The contingent suppression order concept bypasses legislative inertia. If it turns out that, unconstrained by majoritarian politics, the courts are incapable of setting damages within a tolerable range, we at least will have learned that the "tort alternative" we have debated for so long is an illusion. Scholars then might turn to the possibility of admitting tainted evidence contingent on institutional reforms such as professional discipline and more rigorous training. Or we might ask how best to improve the present rule's operation, motivated by the realization that the suppression remedy is, all things considered, the best we can do.