The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence

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ABSTRACT

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence is constructed upon an analytic mistake that H.L.A. Hart described in another context as a "spectacular non sequitur." That path to irrelevance is paved by the Court's recent insistence that the sole justification for excluding evidence seized in violation of the Fourth Amendment is the prospect of deterring law enforcement officers. This deterrence-only approach ignores or rejects more principled justifications that inspired the rule at its genesis and have sustained it through the majority of its history and development. More worrisome, however, is the conceptual insufficiency of deterrence considerations alone to justify core components of the Court's Fourth Amendment exclusionary rule doctrine, including the good faith exception, the cause requirement, and the requirement to show standing. That conceptual deficit has produced an opaque body of doctrine that is often incoherent and always speculative and unpredictable. Faced with these results, the Court has two options. First, it can abandon almost a century of doctrine in favor of a dramatically expanded exclusionary rule cut loose from general rules and exceptions; or, second, the Court can preserve the bulk of its Fourth Amendment exclusionary rule jurisprudence by adopting a hybrid theory of the exclusionary rule that embraces retributive principles. This Article argues for the latter course and explores the consequences. Principal among them is that the Court must accept the exclusionary rule as the natural and necessary sanction for Fourth Amendment violations rather than a contingently justified judicial doctrine. Although some Justices and their academic supporters may think this a steep price to pay, this Article argues that the costs are more than justified by the rewards of doctrinal coherence, added clarity, and predictability.

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Introduction

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence is constructed upon an analytic mistake that H.L.A. Hart described in another context as a "spectacular non sequitur." That path to irrelevance is paved by the Court's insistence that the sole justification for excluding evidence seized in violation of the Fourth Amendment is the prospect of deterring law enforcement officers. This deterrence-only approach ignores or rejects more principled justifications that inspired the rule at its genesis and have sustained it through the majority of its history and development. More worrisome, however, is that deterrence considerations are conceptually insufficient to justify core components of the Court's Fourth Amendment exclusionary rule doctrine, including the good faith exception, the cause requirement, and the requirement to show standing.

Faced with this conclusion the Court has two options. First, it can abandon almost a century of doctrine in favor of a dramatically expanded exclusionary rule cut loose from general rules and exceptions; or, second, the Court can preserve and clarify the bulk of its Fourth Amendment exclusionary rule jurisprudence by adopting a hybrid theory of the exclusionary rule that embraces retributive principles derived from the constitutional imperatives historically

¹ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968).

² See, e.g., Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.")

³ See generally Robert M. Bloom & David H. Fentin, "A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule, 13 U. PA. J. CONST. L. 47 (2010); Francis A. Allen, The Judicial Quest for Penal Justice: the Warren Court and the Criminal Cases, 1975 U. Ill. L.F. 519, 536.

⁴ The deterrence-only approach is also insufficient to justify the wide-ranging collateral use exception, which allows the government to rely on unlawfully seized evidence in non-criminal proceedings such as parole hearings and deportation procedures. The range of issues implicated by the collateral use exception are quite broad and therefore are reserved for separate treatment. *See* David Gray, Meagan Cooper, & David McAloon, The Supreme Court's Contemporary Silver Platter Doctrine (Feb. 25, 2012) (unpublished manuscript on file with author).

dominant in the Court's exclusionary rule cases.⁵ This Article contends that the Court should take the latter road. There are tolls to be paid, of course; but they are modest and few. Principal among them is that the Court must again endorse the exclusionary rule as a "necessary consequence of a Fourth Amendment violation" rather than as a mere judicial construction that is contingently supported by speculative and abstract deterrence calculations. This Article therefore stands in opposition not only to the contemporary Court, but also to proposals by Guido Calabresi, ⁷ Christopher Slobogin, ⁸ Akhil Amar, ⁹ Randy Barnett, ¹⁰ Richard Posner, ¹¹ and others that would jettison the exclusionary rule in favor of alternatives such as sentencing reduction and civil enforcement. ¹²

The charge of spectacular non sequitur requires explanation and elaboration. Part I makes the initial case. Part II traces the history of the Court's cases to highlight the central role of constitutional principle in the Court's construction and elaboration of the Fourth Amendment exclusionary rule and its more recent decision to justify the rule as a form of punishment designed to

⁵ Cf. Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition," 16 CREIGHTON L. REV. 565, 565 n.1 (1983) (noting that the exclusionary rule "did originally and for much of its life" rest on principle rather than utility).

⁶ Herring v. United States, 555 U.S. 135, 141 (2009).

⁷ Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2002).

⁸ Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363.

⁹ See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 791–92 (1994). For an incisive critique of Amar's views on the Fourth Amendment and exclusionary rule, see Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820 (1994).

¹⁰ Randy E. Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice, 32 EMORY L.J. 937 (1983).

¹¹ Richard A. Posner, Rethinking the Fourth Amendment, 1981 SUP. CT. REV. 49.

¹² For a trenchant argument against civil enforcement, see Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

deter officers from violating the Fourth Amendment.¹³ Although subject to criticism on and off the Court, this "punitive turn"¹⁴ raises the question of what theory of punishment should guide courts when applying the exclusionary rule.

Part II draws connections between the Court's historical concerns with constitutional principle and retributivist theories of punishment to propose a hybrid theory committed both to retributivist principles and to utilitarian concerns. This proposal is offered not as an ideal defense of the exclusionary rule but as a conceptually coherent account of the Court's exclusionary rule jurisprudence after taking the punitive turn as a given. Others may prefer to turn back the clock, but that is not the agenda here.¹⁵

Part III discusses major components of the Court's exclusionary rule jurisprudence including the good faith exception, the cause requirement, and the standing requirement, and offers three principal reasons why this hybrid approach is both novel and more powerful than prior attempts to theorize the Fourth Amendment exclusionary rule. First, as Christopher Slobogin has pointed out, all of the non-utilitarian defenses of the exclusionary rule that have been offered so far turn on the claim that suppression is an individual right of the defendant. The hybrid approach proposed here does not; rather, it frames exclusion as a retributively justified public response to illegal searches. Second, as Akhil Amar has argued, all of the Court's attempts to justify the exclusionary rule and its doctrinal components after the punitive turn "are wholly inadequate to the task at hand" and "cannot explain where [the exclusionary rule] comes from . . . why it applies only in criminal and not

¹³ Sharon L. Davies, The Penalty of Exclusion—A Price or Sanction?, 73 S. CAL. L. REV. 1275, 1294, 1310–15 (2000).

¹⁴ After taking its punitive turn, the Court has borrowed heavily from its own constitutional tort doctrine. *See* Jennifer E. Laurin, *Trawling for* Herring: *Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011). Laurin suggests that this borrowing has brought considerable confusion to the Court's exclusionary rule jurisprudence. The remedy promoted in this Article might be of considerable use in meeting those concerns. *See infra* Part III.

¹⁵ See, e.g., Robert M. Bloom & Erin Dewey, When Rights Become Empty Promises, 46 IRISH JURIST 38 (2011).

¹⁶ Slobogin, *supra* note 8, at 365.

civil cases . . . [or the] Fourth Amendment standing doctrine."¹⁷ The hybrid approach is up to this task. Third, in answer to frequent complaints about the Court's contemporary deterrence-only approach, renewed again recently in *Messerschmidt v. Millender*, ¹⁸ the hybrid approach promises welcome predictability by providing lower courts with clear guidance based on familiar common law rules governing criminal responsibility. Part IV concludes.

I. The Spectacular Non Sequitur

Jeremy Bentham famously attempted to rationalize familiar culpability excuses such as infancy and insanity based solely on utilitarian considerations¹⁹ and without relying on the retributivist principles traditionally deployed to defend common law conditions of criminal responsibility.²⁰ H.L.A. Hart later argued that Bentham's efforts amounted to a "spectacular non sequitur." This Part contends that the charge Hart levels at Bentham applies with equal force to the Supreme Court's efforts to justify the Fourth Amendment exclusionary rule based solely on deterrence considerations. It begins by elaborating Hart's critique of Bentham.

A. Bentham's Spectacular Non Sequitur

The common law has long excused those who act from infancy, insanity, or honest mistake of fact. Retributivists endorse these excuses in light of their principled commitment to punish only those who are culpable for their conduct.²² Bentham rejected retributivism but was nevertheless

¹⁷ Amar, *supra* note 9, at 791–92.

¹⁸ Petition for Writ of Certiorari, Messerschmidt v. Millender, No. 10-704 (Nov. 22, 2010), *cert. granted*, 131 S. Ct. 3057 (2011) (presenting the question whether "the Malloy/Leon standards [should] be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct . . .").

¹⁹ Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, Chap. 13, § 3 (1789).

²⁰ See, e.g., 5 Blackstone, Commentaries on the Laws of England *20–33.

²¹ HART, *supra* note 1, at 19.

²² For a brief sketch of these retributivist commitments, see David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1656–72 (2010).

interested in preserving these common law excuses. He therefore attempted to reconstruct them based solely on utilitarian considerations.²³ Bentham's efforts turn on his claim that it would be "inefficacious" to punish inculpable offenders because the threat of penal sanction did not and could not reach them and therefore did not and could not have played a role in their decisions to act.²⁴ From a utilitarian point of view, Bentham reasons, punishing the inculpable simply serves no crime-control purpose because they could not have been deterred. Bentham therefore concludes that the insane, the infantile, and those who act from mistake should qualify for a general excuse from criminal responsibility because punishing them would cause pain without generating compensatory reductions in future disutility as a product of deterrence.²⁵

The substance buttressing Hart's charge of "spectacular non sequitur" is that Bentham's attempted reconstruction of common law excuses falls well short of justifying a *general* prohibition against, for example, punishing the insane. Rather, "all that [Bentham] proves," Hart writes, "is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions is concerned." "Plainly," Hart continues, "it is possible that though (as Bentham says) the *threat* of punishment could not have operated on them, the actual *infliction* of punishment on those persons may secure a higher measure of conformity to the law on the part of normal persons than is secured by the admission of excusing conditions." It is a straightforward but powerful point with echoes in the distinction between specific deterrence and

²³ BENTHAM, *supra* note 19 at Chap. 13, § 3.

²⁴ *Id*.

²⁵ For a contemporary overview of punishment theory's concerns with utilitarian justifications see Dan Markel, Chad Flanders, & David Gray, Beyond Experience: Getting Retributive Justice Right, 99 CALIF. L. REV. 605 (2011); Gray, supra note 22; Dan Markel & Chad Flanders, Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice, 98 CALIF. L. REV. 907 (2010); John Bronsteen, Christopher Buccafusco, & Jonathan Masur, Happiness and Punishment, 76 U. CHI. L. REV. 1037, 1037 (2009); Adam J. Kolber, The Subjective Experience of Punishment, 109 COLUM. L. REV. 182, 212–13 (2009).

²⁶ HART, *supra* note 1, at 19.

²⁷ *Id*.

general deterrence. Punishing an insane offender may not serve to deter that offender or others who are insane. However, punishing all offenders, including the insane, may well aid in deterring other potential offenders who would be inclined to violate the law were it not for the clear and consistent threat of punishment backed by general enforcement of the law. Hart's point also has a temporal dimension. After all, although it is certainly true that punishing an insane offender—or any offender—now will not have deterred him in the past, it does not follow that doing so will not deter him in the future if his condition abates or if punishing now provides traction for future threats of punishment. The point is particularly persuasive in the case of mistakes of fact. That is in part why criminal codes and theories grounded in utilitarian considerations are willing to recognize strict liability crimes and to punish offenders who make negligent mistakes of fact.

We can also see Hart's point by subjecting Bentham's defense of excuses to an argument ad absurdum. Let us start with the fundamental deterrence premise:²⁹

1. Punishment is justified if and only if it will reduce future crime by deterring potential offenders.

Now consider in syllogistic form Bentham's reconstruction of culpability excuses:

- 2. An offender should be punished if and only if his punishment will deter him or similarly situated offenders from committing future crimes.
- 3. Punishing an insane offender will not deter him or similarly situated insane offenders.
- 4. Therefore, by *modus tollens*, insane offenders should not be punished.

For purposes of the argument, let us assume premises 1 and 2. Now, every criminal offender was not, by definition, deterred by previous punishments inflicted against him and other

²⁸ See, e.g., MODEL PENAL CODE § 2.02 (Official Draft 1962).

²⁹ A more complete consequentialist justification of punishment would entail a more holistic accounting of the costs and benefits associated with punishment. *See, e,g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Although more complicated, that complete picture does not bar analysis of the components because a totality is the sum of its parts, even if there is a premium added to the whole.

similarly situated offenders. Furthermore, every future offender will, by definition, not have been deterred by the threat of punishment posed by prior punishments of him or other similarly situated offenders. If the measure of criminal responsibility is whether an offender and those similarly situated would be deterred if he is punished, then it seems to follow that nobody who violates the law should be punished because neither he nor anybody who is similarly situated—law-breakers—was or will be deterred by the spectacle. By contrast, the innocent have and do demonstrate their susceptibility to the threat of punishment. Therefore, if Bentham's argument is taken to its natural conclusion, then it seems that only the innocent should be punished because it is only the innocent who have demonstrated that they and those similarly situated have been deterred or will be deterred.³⁰

Unfortunately, a practice of punishing the innocent and excusing the guilty leaves no motive to obey the law. Worse, it actually provides an incentive for citizens to break the law in order to demonstrate that they are undeterred, undeterrable, and that, therefore, they should not be punished because they belong to the class of persons for whom punishment would serve no deterrent purpose. Thus, Bentham's defense of common law excuses actually incentivizes future crime. Abiding this result would obviously compromise the core goal of utilitarianism set forth in the first premise. To avoid this absurd result Bentham appears to have two choices. First, he can abandon punishment as a practice; but that gets him nowhere because it removes major disincentives against committing crimes. Alternatively, he can abandon his second premise and thereby license punishing

³⁰ Cf. John Rawls, A Theory of Justice 9 (1971).

³¹ Although this may seem far-fetched, Part III explains how the Court's contemporary deterrence-only approach creates strong incentives for officers to violate the Fourth Amendment. *See also*, Gray, Cooper, & McAloon, *supra* note 4.

the guilty regardless of whether they or those like them will be deterred as long as doing so will enhance general deterrence. Hart argues that Bentham is committed to this latter course.³²

None of this means that the balance of costs and benefits might not be in favor of excusing any individual offender who is inculpable. Rather, the point is that deterrence considerations alone cannot justify a *general* excuse for all offenders who are inculpable.³³ For example, one might argue that excusing the insane as a class would not diminish general deterrence because there are relatively few such offenders. However, if we can excuse, say, twenty percent of offenders without compromising general deterrence, then it is not clear why culpability rather than the nature of the offense, risk and nature of future offenses, sensitivity of the offender,³⁴ or any number of other case-dependent considerations would not matter more if the overall project is to minimize pain and maximize pleasure.³⁵

There are also considerable crime-control advantages to be gained by punishing more generally without taking into account excusing conditions.³⁶ Doing so would likely encourage

³² Bentham does not appeal to other utilitarian justifications of criminal punishment such as incapacitation or rehabilitation, and for good reason. Incapacitation and rehabilitation both turn on individualized assessments of future dangerousness, which spin free from general considerations of culpability. Take crimes of passion. Some crimes of passion are committed by otherwise good citizens faced with one-off circumstances. The classic example is the cuckold. Others are committed by hotheads prone to losing their tempers. Although the effects of passion on their culpability may be the same, the cuckold is much less likely to reoffend than the hothead and, therefore, there is little reason to incapacitate or attempt to rehabilitate the cuckold but there is strong reason to make those attempts with the hothead.

³³ Becker, *supra* note 29, at 170.

³⁴ See Bronsteen, Buccafusco, & Masur, supra note 25. As I have argued elsewhere, the prospect of taking offender sensitivity into account when determining whether to punish counts as good reason not to be a subjectivist utilitarian. See supra note 22.

³⁵ The American Law Institute early on endorsed this kind of approach, see ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3, Commentary 407 (Apr. 15, 1975 Proposed Official Draft), as have courts in Canada and New Zealand, see Bloom & Dewey, *supra* note 15.

³⁶ See Dan Markel, Executing Retributivism: Panetti and the Future of the Eighth Amendment, 103 Nw. U. L. REV. 1163, 1171-72 (2009).

greater attention and care, thereby reducing negligence and accompanying harm.³⁷ As Hart points out, punishing the inculpable would also avoid sticky credibility concerns and eliminate the motive for defendants to malinger in order to avoid liability.³⁸ Punishing the inculpable might also convey a more consistent, clear, and coherent message to the public regarding the normative commitments of the criminal law, thereby enhancing what Paul Robinson and John Darley have referred to as "The Utility of Desert."³⁹

This last point suggests another potential Benthamite response. One might argue that those who can be deterred would understand the morality of excusing the inculpable and that, therefore, providing culpability excuses would not diminish general deterrence. That point might be taken further to suggest that punishing the inculpable risks reducing the moral status of the criminal law in the eyes of its general audience by inflicting punishment on those who are not culpable.⁴⁰

Diminishing the moral status of the law by punishing the inculpable, the argument might go, would actually serve as less of a deterrent than a morally constrained program of punishment that attended to issues of culpability.⁴¹

Although there is considerable merit to this line of argument, it is hard to see how Bentham or anyone defending his project could pursue it. To do so would simply give away the day by admitting through the back door the moral principles, rights, and retributivist justifications of punishment that Bentham barred at the front door. After all, to argue that a morally coherent

³⁷ Herring v. United States, 555 U.S. 135, 153–56 (2009) (Ginsburg, J., dissenting).

³⁸ HART, *supra* note 1, at 19–20.

³⁹ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453 (1997). *See also* Christopher Slobogin, *Some Hypotheses about Empirical Desert*, 42 ARIZ. ST. L.J. 1189 (2011) (critiquing Robinson and Darley); Markel & Flanders, *supra* note 25 (defending a theory of criminal punishment based on communication of condemnation).

⁴⁰ I am in debt to Deborah Hellman for pressing this argument.

⁴¹ Sam J. Ervin, Jr., The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment, 1983 SUP. CT. REV. 283, 293.

practice of punishment that hews closely to considerations of principle, rights, and retribution will generate greater overall faith in and obedience to the criminal law is to argue that considerations of principle, rights, and retribution should drive the theory and practice of punishment. The underlying motives for that commitment matter little, if at all. Whether allegiance to retributivist principle is motivated by sincere commitment or cool practicality, the result is the same: a retributivist policy and practice.

These considerations ultimately led Hart to conclude that orthodox utilitarianism is incapable of justifying both our common intuitions about culpability and the familiar foundations of moral culpability upon which our practices of criminal blame and punishment are constructed. He therefore favored an approach to the project of justifying punishment that incorporates retributivist principles.⁴² He is in good company,⁴³ counting among his friends the United States Congress,⁴⁴ the American Law Institute,⁴⁵ and many state legislatures.⁴⁶

There is certainly more that can be said about Hart's debate with Bentham. This short primer is enough for present purposes, however. The next Section makes the preliminary case that the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence suffers from the same conceptual problems Hart exposed in his critique of Bentham. Part III deepens the analysis by discussing individual components of the Court's doctrine.

⁴² HART, *supra* note 1, at 210.

⁴³ See, e.g., John Bronsteen, Retribution's Role, 84 IND. L.J. 1129 (2009).

⁴⁴ See 18 U.S.C. § 3553(a)(2) (2006).

⁴⁵ See Model Penal Code § 1.02(2) (Proposed Official Draft 2007).

⁴⁶ See, e.g., Cal. Penal Code § 1170 (2011).

B. The Supreme Court's Spectacular Non Sequitur

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence rests on the same "spectacular non sequitur" that Hart identifies in his critique of Bentham. The Court is led on this side trip by its relatively recent but consistent assertion that the sole justification for the exclusionary rule is to punish offending officers in order to "deter future Fourth Amendment violations." Just as it did for Bentham, this deterrence-only approach has forced the Court to incoherence and absurdity when trying to identify and justify circumstances in which Fourth Amendment violations should be excused. Take for example Chief Justice Roberts's explanation of the good faith exception in *Herring v. United States*. 48

In *Herring*, investigating officer Mark Anderson became suspicious when petitioner Bennie Dean Herring gained access to his impounded truck to retrieve "something." Knowing full-well that his gut instincts did not rise to reasonable suspicion, much less probable cause, Anderson refrained from stopping, arresting, or searching Herring as he exited the impound lot. Anderson instead contacted a county clerk to determine whether there were any outstanding warrants against Herring that would justify his arrest. Finding nothing in the records available to her, that clerk consulted her peer in an adjoining county, who reported that her records showed that there was an active bench warrant against Herring for failure to appear. In reliance on this representation, Anderson stopped Herring, arrested him, and, during a search incident to arrest, discovered a small amount of methamphetamine and a gun, both of which were illegal for Herring to possess. The problem was that Anderson was misled. There was no active warrant for Herring's arrest. There

⁴⁷ Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

⁴⁸ 555 U.S. 135, 142 (2009).

⁴⁹ *Id.* at 137. It is clear from the record that Anderson and Herring had a history of mutual antagonism and that Anderson's motives may not have been entirely pure. *See* Laurin, *supra* note 14, at 677-78. As the Court made clear in *Whren v. United States*, 517 U.S. 806 (1996), however, Anderson's motives are irrelevant to the question whether his conduct was objectively reasonable under the Fourth Amendment.

once was, but that warrant had been recalled five months earlier. For whatever reason, the police database had not been updated. Word of the mistake reached Anderson fifteen minutes after his initial inquiry, but by then it was too late.

Herring moved at trial to suppress the drugs and gun on grounds that they were fruit of an illegal arrest and search incident to arrest. That motion was denied at trial and on direct appeal by the Eleventh Circuit Court of Appeals. Each of these courts assumed without finding that the initial arrest did violate the Fourth Amendment and instead denied Herring relief in the form of exclusion based on the ground that Anderson had acted in "good faith." Chief Justice Roberts, writing for the Court, affirmed. He began by reciting a now familiar refrain: that the exclusionary rule imposes a "costly toll upon truth-seeking" and that it lets "guilty and possibly dangerous defendants go free." Those costs can only be justified, he wrote, where exclusion "results in appreciable deterrence." The Herring majority ultimately concluded that punishing Anderson could not deter future violations. "[C]rucial" to that holding was the lower courts' finding that neither Anderson nor the law enforcement employees upon whom he relied were "reckless or deliberate" in their actions. At worst, the Court confirmed, the failure to update the warrant database was

⁵⁰ Herring, 555 U.S. at 138.

⁵¹ *Id.* at 138–39.

⁵² *Id.* This procedure is not preferred because it avoids clarifying the constitutional issue. *See* United States v. Dahlman, 13 F.3d 1391 (10th Cir. 1993). *Cf.* Pearson v. Callahan, 555 U.S. 223, 232–36 (2009) (explaining non-mandatory preference that courts decide constitutional issues before reaching questions of qualified immunity in order to avoid "constitutional stagnation").

⁵³ Herring, 555 U.S. at 141. See also People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J., suggesting that the exclusionary rule has the effect of letting criminals "go free . . . because the constable has blundered"); WIGMORE ON EVIDENCE, § 2184 (3d ed. 1940) (same). Although beyond the scope of this Article, it is worth pointing out that these costs are actually imposed by the Fourth Amendment itself rather than the exclusionary rule. See United States v. Leon, 468 U.S. 897, 946 (1984) (Brennan, J., dissenting).

⁵⁴ Herring, 555 U.S. at 141 (internal quotation marks, alterations, and citations omitted).

⁵⁵ *Id.* at 140 (citation omitted).

"negligent."⁵⁶ The Court thought this an important distinction because "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."⁵⁷ "To trigger the exclusionary rule," the Court held, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."⁵⁸ Given that law enforcement officers who act in reliance on honest mistakes of fact are not aware that they are or very well may be violating the Fourth Amendment, the Court concluded that they cannot and will not be deterred by the threat of exclusion and that, therefore, the exclusionary rule should not apply in cases where officers like Anderson act in "good faith."⁵⁹

The Court's logic in *Herring* parallels exactly Bentham's reconstruction of common law culpability excuses and therefore stands as an equally spectacular non sequitur. Chief Justice Roberts is surely right that officers like Anderson who act from honest mistakes of fact are not readily susceptible to deterrent *threats*. To paraphrase Hart, however, the actual *infliction* of punishment on Anderson and his ilk likely would secure a higher measure of conformity with the law on the part of law enforcement officers generally by deterring them directly or indirectly through what William Mertens and Silas Wasserstrom have called "systemic deterrence." Hart's point, extended here, is that there is no reason to think that punishing Anderson would not aid in deterring the members of

⁵⁶ Id.

⁵⁷ *Id.* at 143.

⁵⁸ *Id.* at 144.

⁵⁹ *Id.* at 145.

⁶⁰ 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, 394-401 (1981). *See also* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 Geo. L.J. 1077, 1084–85 (2011); Slobogin, *supra* note 8, at 393; Kamisar, *supra* note 5, at 660–61 (citing the almost immediate effect of *Delaware v. Prouse*, 440 U.S. 648 (1979), in altering automobile stop policy and practice of the Delaware state police); Steiker, *supra* note 9, at 852; Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 323–24.

this rather large audience, which includes the future him. To the contrary, there is good reason to think that they would be deterred less. After all, as Justice Marshall—channeling Hart—points out in *Harris v. New York*, the creation and proliferation of excuses may complicate the deterrent message to the point of "barely begin[ning] to eliminate the incentives to violate the Constitution."

There are many responses that proponents of the Court's contemporary deterrence-only approach to the exclusionary rule might make here. Part III explores them. For the present, however, it is critical to note that Hart's critique does not mean that a full cost-benefit analysis of exclusion in any particular case would not recommend against inflicting exclusion against a Fourth Amendment violator. Rather, the point defended here is that the Court cannot justify *general* exceptions on deterrence grounds without indulging a non sequitur. Given this, it is tempting to conclude that the good faith exception and other culpability-based excuses endorsed in the Court's Fourth Amendment exclusionary rule jurisprudence should be abandoned. That conclusion would be too quick, however. Hart explains why in his critique of Bentham. The sharp end of Hart's argument is not that we should abandon common law excuses. Rather, his point is that we cannot rationalize or justify those excuses solely on deterrence grounds. To preserve these excuses we must

⁶¹ Mertens & Wasserstrom, supra note 60, at 396.

⁶² New York v. Harris, 495 U.S. 14, 23 (1990) (Marshall, J., dissenting). See also Davies, supra note 13, at 1319; Kamisar, supra note 5, at 662; Mertens & Wasserstrom, supra note 60, at 388. Without displaying an awareness of the non sequitur, the Court in Herring hints at a response to Justice Marshall by quoting at length from Judge Friendly's classic article The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 953 (1965). Herring, 555 U.S. at 143–44. There, Judge Friendly suggests that punishing flagrant Fourth Amendment violations may provide sufficient threat to deter officers who can be deterred. I address this point infra in Part III.A.

⁶³ This objection does not violate the constraints on Supreme Court critiques promoted by Frank Easterbrook in his canonical article *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). There Professor, and now Judge, Easterbrook relies on Kenneth Arrow's Nobel-Prize-Winning Impossibility Theorem to argue that the Supreme Court cannot maintain doctrinal consistency over time without sacrificing core procedural commitments. *Id.* at 823-31. Easterbrook's conclusions have since been contested. *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION-MAKING 28, 197-98 (2000). The primary critique advanced here is not that the Court violates the law of transitivity between and among cases but, rather, that within cases the premises applied by the Court do not support its conclusions and, worse, often lead to absurdity. As Easterbrook points out, this brand of critique is still well within bounds. *See* Easterbrook, at 830. I am in debt to Orin Kerr for impressing upon me the need to make this clarification and to Max Stearns for his patient tutelage.

instead rely on retributivist justifications of punishment embedded in the common law. Put differently, although deterrence may be a conceptually adequate sword for justifying punishment generally, it is a woeful shield in that it lacks the conceptual capacity necessary to justify general excuses.⁶⁴ Raising those shields requires the strong arms of retributivism.

As the rest of this Article will argue, on pains of abandoning some of the most significant components of its exclusionary rule doctrine, the Court must follow Hart's lead by adopting an approach to the Fourth Amendment exclusionary rule that relies on retributivist principle as well as considerations of utility. This proposal is novel, but it is not radical as a historical matter. Although some justices have managed recently to persuade bare majorities of the Court to endorse the claim that deterrence is the sole justification for the Fourth Amendment exclusionary rule, for most of the history of the rule the Court relied upon constitutional principle. The next Part proposes that the Court return partway to those roots by adopting a hybrid approach to the exclusionary rule that incorporates retributivist commitments derived from the constitutional principles that animated the exclusionary rule at its genesis and through its early development.

II. A Brief History of the Fourth Amendment Exclusionary Rule

This Part traces briefly the history of the Fourth Amendment exclusionary rule to make an uncontroversial point: although the contemporary Court has adopted a deterrence-only approach to the exclusionary rule after the punitive turn, the original foundations of the rule rest on constitutional principle. It then proceeds to make a more novel point: that these principled concerns line up with retributivist justifications of punishment, which provides doctrinal foundation for a hybrid approach to the exclusionary rule after the punitive turn. Part III argues that the Court

⁶⁴ See Posner, supra note 11, at 74 (defending a case-by-case approach to Fourth Amendment questions).

⁶⁵ See infra Part II.A.

must either embrace this hybrid approach or abandon general limitations on the exclusionary rule including the good faith exception, the cause requirement, and the standing requirement.

A. The Principled Origins of the Exclusionary Rule

The exclusionary rule is credited as an American innovation,⁶⁶ and a relatively recent one at that.⁶⁷ Justice Story reported in 1822 that he had never heard of such a thing.⁶⁸ A criminal defendant seeking to exclude illegally seized evidence from his criminal trial was roundly rebuffed by the Supreme Judicial Court of Massachusetts in 1841.⁶⁹ In fact, it was not until 1886 that the exclusionary rule first made a splash in *Boyd v. United States*.⁷⁰ Even then the Court did not support

⁶⁶ See, e.g., Wolf v. Colorado, 338 U.S. 25, 29 (1949) (noting that "most of the English-speaking world does not regard as vital" the "exclusion of evidence thus obtained" illegally). Other common law countries have followed our lead in the interim. For example, the Canadian Charter of Rights and Freedoms grants courts authority to exclude evidence seized in violation of the Charter if admitting that evidence "would bring the administration of justice into disrepute." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 § 24(2) (U.K.). New Zealand and Ireland also recognize versions of the exclusionary rule. See Bloom & Dewey, supra note 15.

⁶⁷ See William C. Heffernan, The Fourth Amendment Exclusionary Rule as a Constitutional Remedy, 88 GEO. L.J. 799, 808 (2000); Amar, supra note 9, at 785–91; 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, 1372-77 (1983). As Amar points out, the primary common law remedy for illegal searches was a suit in trespass against the offending officer himself. Amar, supra note 9, at 774. Prior provision of a warrant served as an absolute defense against such suits, as did success in finding evidence. Id. at 767, 774. Roger Roots recently has disputed this common wisdom The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 GONZ. L. REV. 1 (2011). Professor Roots claims that the willingness of founding era courts to release wrongfully arrested citizens shows an ethical commitment to exclusion. Future research is warranted, but his argument fails in its current form. Professor Roots's argument misses the distinction between dismissals with and those without prejudice. Although it is certainly true that wrongfully incarcerated persons have always had a Fourth Amendment right to release, that relief does not bar later arrest and prosecution should the government develop probable cause. Professor Roots's line of early precedents is not to the contrary. This is a particularly worrisome omission given what appears to have been the usual remedy for Fourth Amendment violations prior to the Court's official embrace of the exclusionary rule. As the early cases show in the offing, the usual remedy for unlawful seizure of property was to return it without prejudice to subsequent lawful subpoena of the property for use as evidence at trial. It was precisely this practice that the Court rejected in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)—for the first time, so far as we know given the current state of the historical record.

⁶⁸ Amar, *supra* note 9, at 786–87 (quoting United States v. La Jeune Eugenie, 26 F. Cas. 832, 843-44 (C.C.D. Mass. 1822) (No. 15,551)).

⁶⁹ Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841) ('If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is not good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were.

^{70 116} U.S. 616 (1886).

exclusion on Fourth Amendment grounds but, rather, held that admission of illegally subpoenaed documents against their owner would violate his Fifth Amendment rights against compelled self-incrimination. It was not until *Weeks v. United States*⁷¹ in 1914 that the Court established exclusion as the primary remedy for violations of the Fourth Amendment; and it did so then out of a commitment to principle.

The Court in *Weeks* first intoned the Fourth Amendment as historical imperative and cast federal agents as bound by "the duty of giving to [the Fourth Amendment] force and effect," which duty the Court held was "obligatory upon all intrusted under our Federal system with the enforcement of the laws." That duty fell with particular force on federal courts, where violations perpetrated by federal agents "should find no sanction" given that federal courts are "charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." Second, the Court recognized that remedies define rights and concluded on that basis that admission of illegally seized evidence posed an inherent contradiction to the Fourth Amendment itself, reducing the right to a nullity. Third, the Court pointed out that the rules are important as rules and that no matter how "praiseworthy" the efforts of law enforcement to "bring the guilty to punishment," they simply cannot "be aided by

⁷¹ 232 U.S. 383 (1914).

⁷² *Id.* at 392.

⁷³ *Id*.

⁷⁴ See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (holding that allowing the government to profit from illegally seized evidence "reduces the Fourth Amendment to a form of words"); Donald Dripps, Living with Leon, 95 YALE L.J. 906 (1986). Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("[E]very right, when withheld, must have a remedy").

⁷⁵ Weeks, 232 U.S. at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution."); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 262 (1998).

the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."⁷⁶ Finally, the Court cited concerns for judicial integrity, which would be violated if Fourth Amendment violations were "affirm[ed] by judicial decision."⁷⁷ Nowhere did the Court in *Weeks* direct itself to the goal of deterring law enforcement officers.

In the years between *Weeks* and *Mapp vs. Ohio*, ⁷⁸ where the Court incorporated the exclusionary rule to the states, the principal justifications for the rule continued to center on concerns with vindicating constitutional principles. As Justice Holmes put the point in *Silverthorne Lumber Co. v. United States*, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The alternative, he wrote, "reduces the Fourth Amendment to a form of words." Justice Butler quoted this language a few years later in *Agnello v. United States*, adding that "[t]he admission of evidence obtained by [an illegal] search and seizure was error and prejudicial to the substantial rights of [the defendant]." In a long chain of subsequent cases the Court upheld exclusion as the constitutionally necessary remedy for Fourth Amendment violations. ⁸² Although the Court remained largely silent in these cases on the principles underlying the exclusionary rule, it

⁷⁶ Weeks, 232 U.S. at 393.

⁷⁷ *Id.* at 394.

⁷⁸ 367 U.S. 643 (1961).

⁷⁹ 251 U.S. 385, 392 (1920).

⁸⁰ *Id*.

^{81 269} U.S. 20, 35 (1925).

 ⁸² See, e.g., Amos v. United States, 255 U.S. 313 (1921); Byars v. United States, 273 U.S. 28 (1927); United States v. Berkeness, 275 U.S. 149 (1927); Taylor v. United States, 286 U.S. 1 (1932); Grau v. United States, 287 U.S. 124 (1932); Nathanson v. United States, 290 U.S. 41 (1933); McDonald v. United States, 335 U.S. 451 (1948); Kremen v. United States, 353 U.S. 346 (1957) (per curiam); Chapman v. United States, 365 U.S. 610 (1961).

gave no indication that deterrence of law enforcement was a significant, much less the exclusive, justification of the rule.

B. The Punitive Turn and the Rise of Consequentialism

The first suggestion that exclusion might serve a deterrent purpose in Fourth Amendment cases appears in the offing in *Byars v. United States*⁸³ where the Court limited the "silver platter doctrine." In *Byars* a federal agent was invited to assist state law enforcement officials as they conducted a search of Byars's home under color of a warrant issued by a state magistrate. During that search the federal and state agents exceeded the scope of the warrant and as a consequence discovered "strip stamps," the possession of which indicated an intention to violate federal liquor laws. The federal officer took custody of all the stamps, which were later introduced in a federal prosecution against Byars. Without "question[ing] the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account," Justice Sutherland implored that "the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." Justice Sutherland did not rest the Court's holding on the goal of "preventing violations," however. He instead cited familiar concerns for judicial integrity and Fourth Amendment imperative as the principal justifications of the exclusionary rule.

^{83 273} U.S. 28 (1927).

⁸⁴ Weeks endorsed exclusion as the primary remedy in federal courts for Fourth Amendment violations perpetrated by federal agents. The Weeks Court nevertheless declined to incorporate the exclusionary rule to the states. In the decades following Weeks, federal courts frequently admitted evidence seized illegally by state law enforcement agents if those state officials neither acted at the direction nor with the foreknowledge of federal agents. This practice was known as the "silver platter doctrine." The Court terminated the practice in Elkins v. United States, 364 U.S. 206 (1960). For an extensive discussion of Elkins and its consequences for current Fourth Amendment exclusionary rule doctrine, see Gray, Cooper, & McAloon, supra note 4.

⁸⁵ Byars, 273 U.S. at 32, 33.

⁸⁶ *Id.* at 33-34 (refusing to give "judicial sanction [to] equivocal methods . . . [that] strike at the substance of the constitutional right").

There was no exclusionary rule watershed between *Byars* in 1927 and *Wolf v. Colorado*⁸⁷ in 1949.⁸⁸ Nevertheless, *Wolf* shows that by 1949 the Court had fully embraced punishment and deterrence as partial justifications of the exclusionary rule. In *Wolf* the Court incorporated the Fourth Amendment to the states but declined to incorporate the exclusionary rule.⁸⁹ Writing for the Court, Justice Frankfurter pointed out that the exclusionary rule is both a remedy personal to the person whose rights are offended⁹⁰ and a general deterrent aimed at law enforcement officers.⁹¹ The Court nevertheless declined to incorporate the exclusionary rule in order to afford states the opportunity to fashion their own remedial schemes.⁹² Justices Rutledge and Murphy each filed vigorous dissents in which the other joined to register their view that known alternatives to the exclusionary rule provided neither sufficient remedy⁹³ nor sufficient deterrence.⁹⁴ *Wolf* therefore

^{87 338} U.S. 25 (1949).

⁸⁸ Kamisar, *supra* note 5, at 598, 601. Although not an in-depth study, *Irvine v. California*, 347 U.S. 128, 137 (1954), does mention the deterrence rationale in passing.

⁸⁹ Wolf, 338 U.S at 27–28, 33. See also United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949) (indicating in dicta that the exclusionary rule is an "extraordinary sanction devised by this Court to prevent violations of the Fourth Amendment").

⁹⁰ The notion that the exclusionary rule provides a personal remedy has since been frequently maligned, but makes a curious reappearance in Justice Scalia's majority opinion in *Hudson v. Michigan*, 547 U.S. 586 (2006). *See infra* Part III.B.

⁹¹ Wolf, 338 U.S. at 30-31.

⁹² Id. at 31–33. State agents in California took advantage of this opportunity to experiment in the years after Wolf. The Supreme Court of California, through the pen of the great Judge Traynor, later declared the experiment a failure, and adopted the exclusionary rule as a matter of state law in People v. Cahan, 282 P.2d 905 (Cal. 1955). One of the most intellectually honest judges to grace the bench, Judge Traynor later recounted his personal conversion from exclusionary rule critic to supporter in a thoughtful essay. See Traynor, supra note 60, at 321–22.

⁹³ Wolf, 338 U.S. at 47–48 (Rutledge, J., dissenting) ("Twenty-nine years ago this Court, speaking through Justice Holmes, refused to permit the Government to subpoena documentary evidence which it had stolen, copied and then returned, for the reason that such a procedure 'reduces the Fourth Amendment to a form of words.' But the version of the Fourth Amendment today held applicable to the states hardly rises to the dignity of a form of words; at best it is a pale and frayed carbon copy of the original, bearing little resemblance to the Amendment the fulfillment of whose command I had heretofore thought to be an 'indispensible need for a democratic society."' (internal citations omitted)).

⁹⁴ *Id.* at 41–47 (Murphy, J., dissenting and citing anecdotal evidence from the states demonstrating that the exclusionary rule plays a necessary and critical role in encouraging meaningful education, training, and respect for the Fourth Amendment among state law enforcement officers).

provides evidence of an emerging vision of the exclusionary rule that is justified both by principle and by an interest in punishing law enforcement officers.

A decade after *Wolf*, interests in exclusion as a form of punishment designed to deter law enforcement made a more prominent appearance in *Elkins v. United States.*⁹⁵ In rejecting the silver platter doctrine, Justice Stewart famously declared that "[t]he [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."⁹⁶ Deploying deterrence as a sword, Justice Stewart reported that the silver platter doctrine "frustrates" state exclusionary rules "in a particularly inappropriate and ironic way" by preserving an incentive for state agents to violate the Fourth Amendment in the hope that any evidence they might seize would be admissible in collateral federal proceedings.⁹⁷

Despite the strength of his utilitarian language and logic, Justice Stewart did not rest the Court's opinion on deterrence alone. He instead cited the "imperative of judicial integrity" as independent grounds for the Court's opinion and expressed considerable concern that "the federal courts [not] be[come] accomplices in the willful disobedience of a Constitution they are sworn to uphold." Although *Elkins* has since been cited for the proposition that deterrence alone justifies the exclusionary rule, the opinion itself bears evidence of the Court's continued commitment to principled justifications for the Fourth Amendment exclusionary rule.

^{95 364} U.S. 206 (1960).

⁹⁶ Id. at 217.

⁹⁷ *Id.* at 221. For a discussion of the collateral use exception to the Fourth Amendment exclusionary rule, see Gray, Cooper, & McAloon, *supra* note 4.

⁹⁸ Elkins, 364 U.S. at 222-23.

The Court's commitment to constitutional principle was confirmed again in Mapp v. Ohio, which incorporated the exclusionary rule to the states. 99 As Justice Harlan reported in his dissenting opinion, the Court's decision in *Mapp* was based on a "syllogism," the major premise of which is that "the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is 'part and parcel' of the Fourth Amendment." The majority based its case for this premise on both the utility of exclusion as punishment and constitutional principle. For example, the Court reprised the experiences of various states and concluded that remedies other than exclusion had proved to be "worthless and futile" as means to punish and deter law enforcement misconduct.¹⁰¹ The Court also confirmed that the exclusionary rule is "an essential part of the right to privacy" embodied in the Fourth Amendment and that failing to require exclusion when state agents violate the Fourth Amendment would be "to grant the right but in reality to withhold its privilege and enjoyment." ¹⁰² Emphasizing that rules matter, the Mapp Court held categorically that "no man is to be convicted on unconstitutional evidence." Finally, the Court followed Elkins and Silverthorne and pointed out that exclusion is required by both "the imperative of judicial integrity" and the principle that governments must obey the rules that govern them in order to maintain their own moral authority. 104

^{99 367} U.S. 643 (1961).

¹⁰⁰ Id. at 678 (Harlan, J., dissenting).

¹⁰¹ Id. at 651–53, 657–58 (majority opinion). See also id. at 669–72 (Douglas, J., concurring).

¹⁰² Id. at 656 (majority opinion).

¹⁰³ *Id.* at 657.

¹⁰⁴ *Id.* at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

C. The Court's Contemporary Deterrence-Only Approach

In the decade following *Mapp* the Court decided more than a dozen Fourth Amendment cases that implicated the exclusionary rule.¹⁰⁵ Although none were as strongly worded or comprehensive as *Mapp*, all applied one or more of the principled justifications for the exclusionary rule.¹⁰⁶ Nevertheless, there were indications that at least two members of the Court, Justices Black and Harlan, regarded punishment and deterrence of law enforcement officers as the most persuasive justification for the rule.¹⁰⁷ Chief Justice Burger cast his lot with Black and Harlan in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.¹⁰⁸ There the Chief Justice indicted the exclusionary rule as the "rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment." Burger agreed that Fourth Amendment rights should be vindicated and that agents and agencies who violate the Fourth Amendment should be punished, he just found unpersuasive prior holdings that the exclusionary rule did the job.¹¹⁰ Although not

¹⁰⁵ In chronological order, they are: Wong Sun v. United States, 371 U.S. 471 (1963) (discussed *infra* Part III.B.); Lopez v. United States, 373 U.S. 427 (1963); 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Linkletter v. Walker, 381 U.S. 618 (1965); Schmerber v. California, 384 U.S. 757 (1966); Warden v. Hayden, 387 U.S. 294 (1967); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967); Bumper v. North Carolina, 391 U.S. 543 (1968); Terry v. Ohio, 392 U.S. 1 (1968); Alderman v. United States, 394 U.S. 165 (1969); Kaufman v. United States, 394 U.S. 217 (1969); Davis v. Mississippi, 394 U.S. 721 (1969); Harris v. New York, 401 U.S. 222 (1971). *Harris* is a Fifth Amendment case, but the majority opinion written by Chief Justice Burger implies that deterrence is a motivation for the Fifth Amendment exclusionary rule. 401 U.S. at 225.

¹⁰⁶ Bloom & Fentin, *supra* note 3, at 53.

¹⁰⁷ See, e.g., Bumper, 391 U.S. at 560-61 (Black, J., dissenting); Alderman, 394 U.S. at 189 (Harlan, J., concurring in part and dissenting in part); Kaufman, 394 U.S. at 238 (Black, J., dissenting). Harlan and Black's interest in limiting the scope of application for the exclusionary rule may well have been motivated in part by an expansion in scope of coverage effected by Warden v. Hayden, 387 U.S. 294 (1967), which enlarged the universe of material subject to exclusion from "fruits and instrumentalities" of the crime to all evidence. I thank Chris Slobogin for suggesting this possibility.

¹⁰⁸ 403 U.S. 388, 414–16 (1971) (Burger, C.J., dissenting). The Chief Justice loaded his musket before arriving on the Court in *Who Will Watch the Watchman*?, 14 Am. U.L. REV. 1 (1964).

¹⁰⁹ Bivens, 403 U.S. 388, at 412.

¹¹⁰ *Id.* at 414–15. Then-Justice Rehnquist gave voice to similar views a few years later in *California v. Minjares*, 443 U.S. 916, 926–28 (1979) (Rehnquist, J., dissenting).

prepared to overturn *Weeks* and *Mapp* in the absence of an alternative, Burger expressed his fervent hope that Congress and the state legislatures would come forth with a structure capable of both serving the interests of individuals whose rights are violated and inflicting direct punishment against law enforcement agents and their agencies.¹¹¹

Having fired a shot over the bow in his *Birens* dissent, Chief Justice Burger organized a broadside fusillade against the exclusionary rule two years later in *United States v. Calandra*, which declined to impose exclusion in grand jury proceedings. ¹¹² Justice Powell's majority opinion in *Calandra* consolidated Chief Justice Burger's skepticism in *Birens* into a concise test for determining whether the exclusionary rule ought to apply in a given class of cases. First, the Court described the considerable costs to truth seeking and criminal justice inflicted by the exclusionary rule. ¹¹³ Second, the Court found that the only way to justify those costs would be if imposing exclusion could provide sufficient offsetting benefits in the form of deterring law enforcement officers. ¹¹⁴ Third, the Court focused on the particulars of the law enforcement offenders and the forum for admission—here a grand jury investigation—to determine whether inflicting exclusion would provide enough deterrence to offset the costs. ¹¹⁵ Based on the assumption that law enforcement officers are usually motivated by arrests and convictions rather than advancing grand jury investigations, the Court found that excluding illegally seized evidence from grand jury proceedings would not deter officers

¹¹¹ Bivens, 403 U.S. at 418–24.

¹¹² Calandra, 414 U.S. 338 (1974). Calandra and other collateral use exception cases are discussed at length in Gray, Cooper, & McAloon, supra note 4.

¹¹³ Calandra, at 349–50.

¹¹⁴ *Id.* at 350–51.

¹¹⁵ *Id.* at 351–52.

from violating the Fourth Amendment, or at least would not provide significant additional deterrence beyond that imposed by the threat of exclusion at trial.¹¹⁶

Calandra was a signal event in the Court's Fourth Amendment jurisprudence for two critical points. First, it marked the first time that the Court specifically declined to recognize any justification for the exclusionary rule other than punishing and deterring law enforcement officers. Second, it used the deterrence rationale for the first time as a shield rather than a sword. Prior to Calandra, deterrence considerations were generally used by the Court only to justify exclusion. It Calandra marks the first time the Court used deterrence considerations to bar exclusion. Justice Brennan declaimed these dramatic shifts in a vigorous dissent joined by Justice Douglas and Justice Marshall, but the die was cast. Although principled concerns would be preserved in subsequent

¹¹⁶ Id. at 351-52.

¹¹⁷ Id. at 355–57 (Brennan, J., dissenting). See also Laurin, supra note 14, at 682. The effectiveness of the exclusionary rule in altering law enforcement behavior is subject to considerable debate. In an early study Dallin Oaks concluded that there was little or no evidence to support the deterrence thesis. Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1970). Bradley Canon later concluded that "[t]here is no way to demonstrate that the rule works or that it does not work." Bradley C. Canon, Ideology and Reality in the Debate over the Exclusionary Rule A Conservative Argument for its Retention, 23 S. TEX. L. REV. 559, 572 (1982). A more recent study by Raymond Atkins and Paul Rubin makes the case that the exclusionary rule has increased law enforcement compliance with the Fourth Amendment, thereby forcing them to engage in more expensive investigative practices with the consequence of raising crime rates. Raymond A. Atkins & Paul H. Rubin, Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule, 46 J.L. & ECON. 157, 159, 163 (2003).

¹¹⁸ One might argue that *Linkletter v. Walker*, 381 U.S. 618 (1965), which declined to extend *Mapp* to state convictions that became final before *Mapp* was decided, was the first instance of using the deterrence rationale as a sword. In *Linkletter*, however, the rules on retroactive enforcement of newly established rights were what did the work. The Court's discussions of enforcement goals were simply to the point that no exception should be made for *Mapp* when the general rule augured against retroactive enforcement on collateral review.

¹¹⁹ As the *Calandra* Court pointed out, *Alderman v. United States*, 394 U.S. 165 (1969), set the stage for this shift. 414 U.S. at 350–51. The disposition in *Alderman*—vacatur and remand—makes it hard to give full credit for actually using the deterrence rationale as a shield.

¹²⁰ Kamisar, *supra* note 5, at 640.

¹²¹ Calandra, 414 U.S. at 365 (Brennan, J., dissenting). For a vigorous critique of Calandra, see DONALD L. HOROWITZ, Mapp v. Ohio: Police Behavior and the Courts, in THE COURTS AND SOCIAL POLICY 220, 239 (1977).

cases through a steady stream of dissenting opinions, ¹²² Justice Powell's formula took center stage. ¹²³ It also tied the Court's exclusionary rule jurisprudence to the spectacular non sequitur. ¹²⁴ Part III exposes and explores those consequences. Before turning to that project, however, the next Section draws connections between the principles historically cited by the Court as grounds for excluding illegally seized evidence and retributivist justifications of punishment to describe an alternative to the contemporary Court's deterrence-only approach.

D. The Exclusionary Rule's Retributivist Roots

As the brief history above shows, there have been two fundamental shifts in the underlying justifications of the exclusionary rule since *Weeks*. First, the Court has decoupled the Fourth Amendment exclusionary rule from the Fifth Amendment exclusionary rule. ¹²⁵ In the late nineteenth century and early twentieth century, the Court was concerned that admitting illegally seized evidence constituted a form of "compelled self incrimination," which implicated Fifth Amendment rights. ¹²⁶ The Court subsequently narrowed its conception of "compelled self

 ¹²² See, e.g., Davis v. United States, 131 S. Ct. 2419, 2436 (2011) (Breyer, J., dissenting); United States v. Herring, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting); Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting); United States v. Leon, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting); United States v. Ceccolini, 435 U.S. 268, 285 (1978) (Marshall, J., dissenting).

¹²³ Bloom & Fentin, *supra* note 3, at 57–59; Bloom & Dewey, *supra* note 15, at 2, 7. As Bloom & Dewey point out, the other common law countries that have an exclusionary rule—Canada, New Zealand, and Ireland—have preserved commitments to principled justifications of the exclusionary rule. So too have many state courts. *See, e.g.*, State v. Prior, 617 N.W.2d 260 (Iowa 2000) (finding that the exclusionary rule is justified, *inter alia*, by concerns for judicial integrity, an interest in protecting rights, and the goal of deterring police officers); Hensley v. Commonwealth, 248 S.W.3d 572 (Ky. Ct. App. 2007) (same); Commonwealth v. Brown, 925 N.E. 2d 845 (Mass. 2010) (same); People v. Brown, 755 N.W.2d 664 (Mich. Ct. App. 2008) (same); State v. Garcia, 217 P.3d 1032 (N.M. 2009) (same); State v. Johnson, 573 A.2d 909 (N.J. 1990) (same).

¹²⁴ See infra Part II.

¹²⁵ See Leon, 468 U.S. at 897, 906; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 59-64 (1969); Slobogin, supra note 8, at 367; Amar, supra note 9, at 788. There is considerable debate about whether this shift was either wise or justified. See, e.g., Kamisar, supra note 5, at 581–97. This Article self-consciously avoids these external debates in favor of a critical argument internal to the punitive turn.

¹²⁶ See, e.g., Agnello v. United States, 269 U.S. 20, 34 (1925); Gouled v. United States, 255 U.S. 298, 303–04 (1921); Boyd v. United States, 116 U.S. 616, 621, 635 (1886).

incrimination" to "testimony," which does not include most "effects" or voluntarily prepared "papers." By the time *Mapp* was decided in 1961 the Fourth Amendment exclusionary rule stood on its own bottom, with only Justice Black maintaining that Fourth Amendment exclusion was linked to the Fifth Amendment prohibition against compelled self incrimination. That shift in doctrine occasioned what might be called a "punitive turn" in the Court's Fourth Amendment exclusionary rule jurisprudence after which exclusion was regarded as a sanction inflicted against the government for violating the Fourth Amendment rather than as a personal remedy or individual right of people who suffer Fourth Amendment violations.

The second and more recent shift in the underlying justifications of the exclusionary rule is a steady movement away from principled justifications.¹³¹ Having reconceived the Fourth Amendment exclusionary rule as a form of judicially imposed sanction, the Court needed a theory of punishment to guide its practice. Perhaps in keeping with the prevailing zeitgeist in theories of

¹²⁷ See Fisher v. United States, 425 U.S. 391 (1976); Schmerber v. California, 384 U.S. 757 (1966).

¹²⁸ Slobogin, *supra* note 8, at 425–26; Heffernan, *supra* note 67, at 813.

¹²⁹ See Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., dissenting).

¹³⁰ See, e.g., 18 U.S.C. § 2236; 18 U.S.C. 1940 ed., Sec. 53a (Aug. 27, 1935, ch. 740, Sec. 201, 49 Stat. 877); United States v. Davis, 131 S. Ct. 2419 (2011); United States v. Herring, 555 U.S. 135, 140-42 (2009); Leon, 468 U.S. at 906; United States v. Janis, 428 U.S. 433, 448 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); McDonald v. United States, 335 U.S. 451, 453 (1948); id. at 457, 461 (Jackson, J., concurring); Weeks v. United States, 232 U.S. 383, 392−94 (1914); Brooks Holland, The Exclusionary Rule as Punishment, 36 RUTGERS L. REC. 38, 42−47 (2009); Davies, supra note 13, at 1294, 1310−15; Heffernan, supra note 67, at 803; Kamisar, supra note 5, at 600, 616. But see Peltier, 422 U.S. at 556−57 (Brennan, J., dissenting); Stewart, supra note 67, at 1400; Friendly, supra note 62, at 951−52. Although the Court has identified "deterrence" as a "primary objective of criminal punishment," Kansas v. Hendricks, 521 U.S. 346, 361−62 (1997), taking the punitive turn did not require the Court to designate exclusion as a form of criminal punishment. For example, "punishment" is common currency in civil and administrative proceedings. See Dan Markel, Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction, 94 CORNELL L. REV. 239 (2009).

¹³¹ Slobogin, supra note 8, at 368; Posner, supra note 11, at 52; Mertens & Wasserstrom, supra note 60, at 372.

punishment at the time, reflected in Herbert Weschler's work on the Model Penal Code, the Court eventually chose deterrence.¹³² That choice was not conceptually or historically necessary, however.

Although deterrence was certainly a concern for the Court in and after *Mapp*, it continued to cite non-utilitarian concerns as central to its development of the Fourth Amendment exclusionary rule. Far from being "expansive dicta," the Court's reliance on these non-utilitarian considerations was conceptually necessary to justify major components of its evolving doctrine. Specifically, although deterrence considerations are sufficient as a sword to justify the exclusionary rule as a form of punishment directed against offending officers and their agencies, deterrence alone cannot act as a shield to justify most general limitations on that sanction, including the good faith exception, the cause requirement, and the standing requirement. Just as Hart suggested in his critique of Bentham, sustaining these components of the Court's Fourth Amendment exclusionary rule doctrine requires reliance upon a hybrid theory of punishment that incorporates and respects the sorts of principled concerns that retributivism holds dear. Fortunately, those retributivist principles are already embedded in the Court's Fourth Amendment jurisprudence.

Although not defined in retributivist terms, the principled concerns cited by the Court before its punitive turn line up with influential theories of retributive punishment. Take for example the Court's frequent assertion that law enforcement officers have a duty as constitutional agents to obey the law and that it would therefore be unfair to convict one of their targets using unlawfully

¹³² There is a robust debate about whether the exclusionary rule can or does actually deter law enforcement officers. See generally Slobogin, supra note 8; Myron Orfield, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016 (1987); Oaks, supra note 117. This Article need not and does not step into the fray.

¹³³ See Heffernan, supra note 67, at 817; Mertens & Wasserstrom, supra note 60, at 382.

¹³⁴ United States v. Davis, 131 S. Ct. 2419 (2011); Hudson v. Michigan, 547 U.S. 586, 591 (2006).

seized evidence.¹³⁵ As Walter Dellinger has commented, when confronted with violations of such a duty "the sanction most frequently imposed in response to a constitutional violation is the sanction of nullification."¹³⁶ The idea that punishment should nullify or expiate an offense has a long history in the retributivist literature.¹³⁷ For example, the philosopher Immanuel Kant invoked the image of the "scale of justice" to argue that crimes, as breaches of duty, compromise the balance of justice.¹³⁸ Punishment, on his view, was justified by "the principle of equality" and was meant principally to bring the scales back into balance.¹³⁹ Although the moral arithmetic may not be exact, the exclusionary rule can be viewed as producing a rough rebalancing of the scales of justice by nullifying or negating the officer's offense.¹⁴⁰

In addition to nullification, the Court has held that exclusion is the natural adjunct to the Fourth Amendment without which the right would be reduced to "a form of words." The notion that rights determine punishments and that punishments in turn give meaning to rights is central to

¹³⁵ See, e.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks, 232 U.S. at 391–92; Leon, 468 U.S. at 896–97 (Brennan, J., dissenting); Kamisar, supra note 5, at 586, 632–33; Mertens & Wasserstrom, supra note 60, at 377.

¹³⁶ Walter Dellinger, Of Rights and Remedies: The Constitution as Sword, 85 HARV. L. REV. 1532 (1972). See also Bloom & Dewey, supra note 15, at 1–2, 29–33.

¹³⁷ See, e.g., Immanuel Kant, The Metaphysics of Morals 105 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797); Wilhelm F. Hegel, Philosophy of Right §§ 82, 90−103 (T.M. Knox, trans. 1967) (1821).

¹³⁸ KANT, *supra* note 137, at 105.

¹³⁹ *Id.* Kant's theory of punishment is notoriously obscure. For a concise account of Kant's retributivism see Gray, *supra* note 22, at 1659–65.

¹⁴⁰ This claim of nullification does not entail a claim that exclusion provides full reparation for or restitution of Fourth Amendment violations.

¹⁴¹ Silverthorne, 251 U.S. at 392. See also Herring, 555 U.S. at 151–52 (Ginsburg, J., dissenting); Leon, 468 U.S. at 896–97 (Brennan, J., dissenting); Mapp, 367 U.S. at 651; Goldstein v. United States, 316 U.S. 114, 120 (1942) (without exclusion, the "policy and purpose of the [fourth] amendment might be thwarted"); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting); Weeks, 232 U.S. at 393; Bloom & Fentin, supra note 3, at 50, 52; Heffernan, supra note 67, at 827–35; Ervin, supra note 41, at 287–90, 295, 304.

a branch of retributivism with its roots in the work of Wilhelm Hegel.¹⁴² Hegel argued that crimes are defined as the negation of rights. Punishment on his view ought to ratify rights by negating crimes.¹⁴³ Hegel's theory of punishment continues to be widely influential, with echoes in Joel Feinberg's expressivism,¹⁴⁴ Jean Hampton's educative theory of punishment,¹⁴⁵ and Dan Markel's confrontational conception of retributivism,¹⁴⁶ each of which highlight in one way or another the capacity for punishment to provide substance and meaning for otherwise abstract legal rights. On this view, the exclusionary rule is necessary to give public meaning and substantive force to the Fourth Amendment. Alternative sanctions, such as tort actions for compensation, fall short at least because they do not express an appropriate level of public condemnation.¹⁴⁷

The exclusionary rule has also been justified as necessary in order to deny the government any benefit from its wrongdoing by returning the parties to the approximate position vis-à-vis the

¹⁴² See HEGEL, supra note 137, §§ 97–103. Thom Brooks has argued recently that Hegel is not a pure retributivist, but, rather, has a "unified theory" of punishment incorporating utilitarian considerations. See, e.g., Thom Brooks, Is Hegel a Retributivist?, 49/50 BULL. OF THE HEGEL SOC'Y OF GREAT BRITAIN 113 (2004); Thom Brooks, Hegel and the Unified Theory of Punishment (Apr. 11, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807031. Although fascinating, this debate is both beyond the scope of this Article and beside its point. Although Hegel himself may well have held a hybrid theory of punishment, one of its components was retributivist and that retributivist element provides valuable context for the retributivist components of the hybrid approach to the exclusionary rule promoted here.

¹⁴³ Cf. Donald Dripps, Living with Leon, 95 YALE L.J. 906 (1986).

¹⁴⁴ See, e.g., Joel Feinberg, Doing & Deserving 118 (1970).

¹⁴⁵ See, e.g., Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution 39 UCLA L. REV. 1659 (1992); Jean Hampton, The Moral Education Theory of Punishment, in Punishment: A Philosophy & Public Affairs Reader 112 (A. John Simmons et al. eds., 1995).

¹⁴⁶ See Dan Markel, Retributive Justice and the Demands of Democratic Citizenship, 1 VA. J. CRIM. L. 1 (2012); Markel & Flanders, supra note 25. One might register some concerns that expansion of retributivist theory to this context and in this fashion might make law enforcement overly conservative with the consequence that more criminals who are within reach of aggressive but lawful law enforcement tactics will go free. I am grateful to Dan Markel for pushing the point, which I address infra in Part III.

¹⁴⁷ Davies, *supra* note 13, at 1291–92, 1303–08, 1318–19. *But see* Jason Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009) (arguing that compensatory actions entail some component of condemnation).

criminal trial they would have been in but for the illegal search. This justification of the exclusionary rule sounds in Herbert Morris's influential work on retributivism. On Morris's view, society can be described as a network of agreements among citizens to do and to refrain. With a nod to Hobbes, Morris acknowledged that abiding those agreements sometimes entails the sacrifice of immediate personal interest, but maintained that respect for the rules ensures greater personal and collective benefit. On this account, crime constitutes an unwarranted claim of personal privilege at the expense of others. Criminals are essentially free riders. Punishment is an attempt to retrieve the undeserved benefits of a criminal act. As a form of retributive punishment, the exclusionary rule follows this model by putting the government and a wronged citizen in approximately the same position they would have been in but for a Fourth Amendment violation.

Another core justification of the exclusionary rule with retributivist roots is the Court's concern that admitting the fruits of Fourth Amendment violations into evidence at trial would compromise the integrity of the courts and the moral standing of the police and prosecutors as role models and defenders of the law.¹⁵⁰ The instinct that those charged with defending the law should

¹⁴⁸ Nix v. Williams, 467 U.S. 431, 447 (1984) (the exclusionary rule "plac[es] the State and the accused in the same positions they would have been in had the impermissible conduct not taken place."). See also Herring, 555 U.S. at 151–52 (Ginsburg, J., dissenting); Bivens, 403 U.S. at 414 (Burger dissenting); Zap v. United States, 328 U.S. 624, 630 (1946) (the exclusionary rule rests on "the theory that the government may not profit from its own wrongdoing"); Olmstead, 277 U.S. at 469 (Brandeis dissenting); Terry, 392 U.S. at 13; Weeks, 232 U.S. at 391–92, 393–94; Leon, 468 U.S. at 943, 944 (Brennan dissenting); Silverthorne, 251 U.S. at 391–92); Weeks, 232 U.S. at 393–94 ("[t]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles."); Norton, supra, note 75, at 262; Heffernan, supra note 67, at 800; Mertens & Wasserstrom, supra note 60, at 377-78; Bloom & Dewey, supra note 15, at 1–2.

¹⁴⁹ See, e.g., HERBERT MORRIS, Persons and Punishment, in ON GUILT AND INNOCENCE 31, 34–35 (1979).

¹⁵⁰ Terry v. Ohio, 392 U.S. 1, 12 (1968); Olmstead, 277 U.S. at 484-85 (Holmes, J., dissenting) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."); Silverthorne, 251 U.S. at 391-92; Bloom & Fentin, supra note 3; Kamisar, supra note 5, at 648 ("The exclusion of reliable evidence does impose a 'cost' on society but so do unreasonable searches and seizures—the perception, by the public and the police alike, that our courts do not take seriously the constitutional protection against such police misconduct."); Mertens & Wasserstrom, supra note 60, at 378.

obey the law is both intuitive and powerful.¹⁵¹ It is also the foundation of a theory of retributivism advanced most recently by Paul Robinson and John Darley that they call "empirical desert."¹⁵² On their view, the moral underpinnings of retributivism are less important than the fact that retributivism appeals to an innate, or at least widely held, views about what justice requires. In order to maintain its legitimacy in the eyes of its subjects, a government cannot stray too far from these common retributivist commitments. The implications for the Fourth Amendment exclusionary rule are clear because, as Justice Brandeis put it:

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole of the people by its example. If the government becomes a lawbreaker, it breeds contempt for the law and invites every man to become a law unto itself. It breeds anarchy. To declare that the end justifies the means would bring terrible retribution.¹⁵³

¹⁵¹ So much so, in fact, that state courts have continued to cite this as a principal justification for the exclusionary rule even as the United States Supreme Court has largely abandoned it. Bloom & Fentin, *supra* note 3, at 78 n.179 (citing cases).

¹⁵² See Robinson & Darley, supra note 39. See also HART, supra note 1, at 25. Empirical desert has come under considerable fire as of late from Chris Slobogin and Lauren Brinkley-Rubinstein. See, e.g., Christopher Slobogin & Lauren Brinkley-Rubenstein, Putting Desert in Its Place, 65 STAN. L. REV. (forthcoming 2012). Their critique is leveled mainly at Robinson's claim that public faith in the law is linked to perceptions of how well actual punishments match public opinion on what punishments should be inflicted. By contrast, Slobogin and Brinkley-Rubinstein seem persuaded by both Robinson's and by Tom Tyler's work arguing that citizens are much less likely to respect the law if they think that the law is enforced unfairly or unequally, or if the think that law enforcement officials routinely violate procedural rights. See id. (citing with approval TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)). This less controversial empirical desert claim is what is relied upon here.

¹⁵³ Olmstead, 277 U.S. at 484–85 (Brandeis, J., dissenting). Justice White later countered that withholding probative evidence and letting the guilty go free might also compromise the public's perceptions of judicial integrity. See Stone v. Powell, 428 U.S. 465, 485 (1976). He went a step further in United States v. Gates, where he wrote that "I am content that the interests in judicial integrity run along with rather than counter to the deterrence concept, and that to focus upon the latter is to promote, not denigrate, the former." 462 U.S. 213, 259 n.14 (1985) (White, J., concurring). Although beyond the scope of this Article, the evidence appears decidedly neutral. Public regard for police and the courts has stayed pretty stable in the years since the Court started expanding exceptions to the exclusionary rule in the 1970s and 1980s. See, e.g., Mark Warr, Poll Trends: The Public Opinion on Crime and Punishment, 59 Pub. Op. Q. 296 (1995); Greg Shaw, Robert Shapiro, Shmuel Lock, Lawrence Jacobs, The Polls—Trends: Crime, The Police, and Civil Liberties, 62 Pub. Op. Q. 405 (1998). There is, however, some data suggesting a general downward trend in public respect for law enforcement since 1967. See Warr, supra, at 310.

Although the Court has never explicitly endorsed retributive theories of punishment as principal justifications of and limitations on the Fourth Amendment exclusionary rule, the foundations are there. As the next Part argues, having left constitutional imperative behind at the punitive turn, the Court must access those foundations or abandon core components of its doctrine, including the good faith exception, the standing requirement, and the cause requirement. Before getting there, however, a few comments on the mechanics of applying the hybrid approach are in order.

E. A Hybrid Theory of the Exclusionary Rule

The goal of this Article is to press a conceptual point with practical consequences: that the Court's stated premises in contemporary exclusionary rule cases do not support its conclusions and that, therefore, it must either abandon its conclusions or adopt different premises. The proposal here is to pursue the latter course. Should the Court accept this proposal and adopt a hybrid theory of the Fourth Amendment exclusionary rule that embraces retributivist justifications for and constraints on punishment then it will face a number of mechanical and practical questions.

Although it is beyond the scope of this Article to address all of these, it is worth a few moments to chart some of the issues and to sketch a few responses.

Among the more vexing challenges to the exclusionary rule as it has been understood after the punitive turn is a concern that the parties punished are not the parties responsible for violating the Fourth Amendment.¹⁵⁴ As the argument goes, the usual offenders are police officers; but it is prosecutors who are punished. As Chief Justice Burger pointed out in *Bivens*, law enforcement officers are primarily interested in making arrests, not getting convictions.¹⁵⁵ Arrests are also a

¹⁵⁴ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971). I am grateful to Teneille Brown, Dan Markel, and Chris Slobogin for pressing these issues.

¹⁵⁵ *Id*.

common measure of police officer performance, but few, if any, state and local police agencies tally convictions for pay and promotion purposes. The time to make and rule on motions to exclude also comes months or years after a search is completed. All of this compromises salience and immediacy, which are crucial components of any deterrence calculus.

As William Mertens and Silas Wasserstrom pointed out long ago, these objections misconstrue the deterrence justification for the exclusionary rule. The real target for deterrence is not the individual officer, but law enforcement agencies of which they are a part. By compromising overall government efforts to prosecute and punish offenders, the exclusionary rule creates strong incentives for those agencies to train police officers.¹⁵⁷ The effects of this "systemic deterrence" are beyond speculation. As the Court noted in *Elkins*, the experiences of California and other states that chose to adopt the exclusionary rule in the years before *Mapp* show that the threat of exclusion had an immediate and dramatic effect on police practice and the working relationships between police and prosecutors.¹⁵⁹ As the Court noted more recently in *Hudson v. Michigan*, that effect has been sustained, providing us with a well-trained and highly professional police force that is far less likely to violate the Fourth Amendment rights of citizens than were their pre-exclusionary rule ancestors.¹⁶⁰

Concerns that the exclusionary rule punishes the wrong party—prosecutors rather than police officers—have even less purchase against a rule grounded in retributive principle. The objection depends on the empirical claim that police officers do not suffer when illegally seized

¹⁵⁶ Oaks, *supra* note 117, at 756.

¹⁵⁷ Mertens & Wasserstrom, *supra* note 60, at 396–406.

¹⁵⁸ *Id*.

¹⁵⁹ See also Atkins & Rubin, supra note 117.

¹⁶⁰ Hudson v. Michigan, 547 U.S. 586, 598–99 (2006).

evidence is excluded from use at trial. As I have argued at length elsewhere, the notion that a sanction must cause subjective suffering in order to qualify as punishment is incoherent and without support in most mainline retributivist theories. To constitute "punishment" from a retributivist point of view all that is necessary is that the sanction be objectively undesirable and justified by a morally coherent theory of punishment. As the previous Section pointed out, the exclusionary rule fulfills these criteria under a range of morally coherent theories of punishment. It is therefore of no moment, from a retributivist point of view, whether an individual officer against whom the sanction is inflicted experiences some degree of subjective suffering. It remains true that exclusion also has consequences for innocent parties, ranging from prosecutors to citizens, but the exclusionary rule is not unique among punishments in that regard. Innocent intimates of convicted criminals routinely experience financial and emotional hardship when their loved ones are imprisoned. The innocent beneficiaries of crimes frequently must return those ill-gotten gains. Although unfortunate, these collateral consequences do not make the sanction any less a punishment for the offender.

Another important set of questions about exclusion as a retributively justified punishment for Fourth Amendment violations attaches to the requirement that punishment be objectively proportionate with the offense. Most retributivist theories of punishment pride themselves on their ability to scale punishment to the crime, reserving the most serious punishments for the most abhorrent acts perpetrated with the highest degrees of culpability. The exclusionary rule seems to

¹⁶¹ See Gray, supra note 22. See also Markel & Flanders, supra note 25.

¹⁶² See Becker, supra note 29, at 180.

¹⁶³ DAN MARKEL, JENNIFER COLLINS, & ETHAN LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 35–58 (2009); Rebecca Naser & Christy Visher, Family Members' Experiences with Incarceration and Reentry, 7 WEST. CRIM. REV. 20 (2006).

¹⁶⁴ I thank Chris Slobogin for issuing this demand.

¹⁶⁵ See Gray, supra note 22. See also Markel & Flanders, supra note 25.

offend proportionality because it is not scalable and, as a consequence, will often over- or underpunish if unintentional and minor breaches of the Fourth Amendment result in excluding critical evidence of serious crimes or contumacious and egregious violations result in excluding duplicative evidence of minor crimes.

As the next Part will argue at some length, this is not a particularly troublesome worry for a hybrid theory of the exclusionary rule that incorporates retributivist commitments. To start, the actus reus of Fourth Amendment violations is a constant in proportionality calculations. Officers either violate the Fourth Amendment or they do not. It may be true that victims of these intrusions experience varying degrees of subjective discomfort, but it is not at all clear that such contingencies can render one Fourth Amendment violation objectively more serious than another. One might posit that the seriousness of Fourth Amendment violations is a function of what is taken in the same way that larceny is often scaled according to the value of goods taken, but this just means that the exclusionary rule is by nature a proportionate sanction that is automatically scaled to the act in every case. By contrast, culpability is not a constant. Here, however, the hybrid approach is uniquely wellsuited to the task. As the next Part argues, a deterrence-only exclusionary rule regime has a difficult time accounting for the culpability of individual officers. A hybrid approach that respects retributivist principles does not. Therefore, under a hybrid regime, non-culpable Fourth Amendment violations should not and would not be subject to sanction. It may be true that, in cases of particularly wicked Fourth Amendment violations, exclusion is not enough punishment; but the hybrid approach proposed here is perfectly amenable to inflicting additional sanctions against officers in these sorts of cases.¹⁶⁶ The exclusionary rule is a floor on severity, not a ceiling.¹⁶⁷

¹⁶⁶ WIGMORE ON EVIDENCE, § 2184 (3d ed. 1940).

¹⁶⁷ Bryan Lammon, The Practical Mandates of the Fourth Amendment, 85 WASH. U. L. REV. 1101, 1136 (2007).

There is much more to be said on the theory and mechanics of a retributively justified exclusionary rule. We will have to set those discussions aside for another day, however, in favor of the more immediate and upstream priority, which is to make the case that a deterrence-only approach is insufficient to bear the weight of the Court's current exclusionary rule doctrine. This is the task taken up in the next Part.

III. The Consequences of the Spectacular Non Sequitur

With a brief history of the Court's Fourth Amendment exclusionary rule jurisprudence and a positive hybrid theory of the exclusionary rule before us, we can turn now to a more detailed account of the conceptual consequences of a deterrence-only approach to the exclusionary rule. The sections that follow expose and examine the consequences of the spectacular non sequitur for some of the key components of the Court's Fourth Amendment exclusionary rule doctrine, including the good faith exception, the cause requirement, and the standing requirement. Each of these discussions leads to the conclusion that deterrence alone is insufficient to keep these important doctrinal commitments afloat. The Court must therefore either abandon them or embrace some version of the hybrid approach described in Part II.

A. The Good Faith Exception

In *Leon v. United States* the Court established an exception to the exclusionary rule in circumstances where the offending officer acted in the "objective good faith" that he was not violating the Fourth Amendment.¹⁶⁸ In *Leon*, and in subsequent "good faith" cases, the Court has rested its holdings on the claim that the Fourth Amendment exclusionary rule is justified only according to its ability to deter law enforcement officers. Unfortunately, the good faith exception

^{168 468} U.S. 897 (1984). The Court hinted in dictum at its willingness to recognize a good faith exception at least as early as *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 800 (1949) ("The Fourth Amendment, important as it is in our society, does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here.").

cannot be justified by deterrence considerations alone without running afoul of the spectacular non sequitur.¹⁶⁹ This does not mean that the good faith exception must be abandoned. In order to justify and sustain the good faith exception, however, the Court must adopt the hybrid approach proposed in Part II. Doing so not only puts the good faith exception on firmer conceptual ground, it also offers welcome clarity to lower courts and therefore promises more predictable outcomes. As the Court's granting certiorari in *Messerschmidt v. Millender* shows, this brand of clear guidance is wanted and needed.¹⁷⁰

In *Leon* the Burbank Police Department received information from a confidential informant implicating "Armando" and "Patsy" in a drug conspiracy involving their home and "another location in Burbank." Further investigation identified potential coconspirators, including Leon, and several locations, including Leon's home. Based on the tip and additional investigation, officers applied for and received a stack of search warrants. Subsequent searches uncovered drugs and other evidence of a drug conspiracy at the parties' homes and at a location that was apparently maintained as a stash house for storing large quantities of drugs. Leon and his codefendants moved to suppress all of this evidence at trial on the grounds that the warrants were issued on less than probable cause. The District Court agreed and found that the searches were illegal, despite having been conducted in good faith. It therefore granted the motions to suppress in part as to each defendant depending upon where each had a reasonable expectation of privacy. As a consequence, all of the illegally seized evidence was admissible against at least some of the defendants and large

¹⁶⁹ Richard Posner came to the same conclusion, though on slightly different grounds. See Posner, supra note 11, at 68.

¹⁷⁰ See infra note 236 and accompanying text.

¹⁷¹ United States v. Leon, 468 U.S. 897, 901 (1984).

¹⁷² *Id.* at 901-03.

¹⁷³ Id. at 903–04.

quantities of illegal drugs seized from the stash house were admissible against all of the defendants.¹⁷⁴ The Ninth Circuit affirmed; but the Supreme Court reversed.

Writing for a five-justice majority, Justice White reprised the main themes from *Calandra* contending that the exclusionary rule exacts "substantial social costs" by compromising the truth-seeking function of trials and by allowing guilty defendants to go free or to bargain for reduced sentences.¹⁷⁵ In the Court's view those costs could be justified only to the extent that exclusion might serve to deter law enforcement officers from violating the Fourth Amendment.¹⁷⁶ Although somewhat skeptical, Justice White "assum[ed] that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment," but nevertheless concluded that exclusion "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." The reason why, according to the Court, was that excluding evidence seized by an officer who holds an objectively reasonable belief that he is obeying the Fourth Amendment cannot alter his "future conduct" or the future conduct of similarly situated officers who also will hold objectively reasonable beliefs in the lawfulness of their conduct.¹⁷⁸ It follows, White concluded for the Court, that exclusion can serve no purpose where, as in *Leon*, the officers searched pursuant to a facially valid warrant which they reasonably believed provided them with lawful authority.¹⁷⁹

¹⁷⁴ *Id.* at 903 n.3. *See also id.* at 944–46 (Brennan, J., dissenting).

¹⁷⁵ *Id.* at 907. Courts in Canada and New Zealand have also argued that letting the guilty go free compromises judicial integrity, or at least public perceptions of judicial integrity. *See* Bloom & Dewey, *supra* note 15, at 31–32.

¹⁷⁶ Id. at 908-09.

¹⁷⁷ Id. at 919.

¹⁷⁸ *Id.* at 919–20.

¹⁷⁹ As Akhil Amar has pointed out, *Leon* is built on shaky historical foundations insofar as it expresses a preference for warranted searches. Because warrants at common law provided state agents an absolute defense against actions in trespass, Amar contends that late eighteenth century Americans were deeply skeptical of warrants and therefore set a high bar on their issuance. *See* Amar, *supra* note 9, at 771–81. In the years since *Leon* parallel decisions in 18 U.S.C. §

The Court's logic in *Leon* rests on the same spectacular non sequitur that Hart identified in his critique of Bentham. Its effect is evident early on, beginning with Justice White's assertion that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Although beyond dispute, this is a non sequitur at least twice over. First, the officers' conduct in *Leon* was not objectively reasonable. To the contrary, their searches and seizures were illegal under the Fourth Amendment and therefore by definition were objectively *imreasonable*. Second, the Court's suggestion that the officers in *Leon* did not know—for good reasons—that they were stepping over the Fourth Amendment line and therefore were not and could not have been deterred is also a non sequitur. Absent a revolution in quantum technology we have no hope that inflicting exclusion against any officer will have deterred him from past violations regardless of culpability. Deterrence is always and can only be prospective. So, as Hart might have put it, although it may be true that the *threat* of exclusion could not have deterred the officers in *Leon*, there is no reason to believe that the actual *infliction* of exclusion against them would not secure a higher measure of conformity to the Fourth Amendment by both them and all other officers than would be secured by recognizing a general good faith exception.

The response suggested by the Court in *Leon* and subsequent good faith cases is that excluding evidence seized illegally but in good faith cannot deter future violations by officers who will act in good faith because they will not, by definition, have reason to suspect that they may be violating the Fourth Amendment and therefore will not be dissuaded from illegal conduct that they

1983 cases have put civil remedies outside the reach of citizens who suffer "good faith" Fourth Amendment violations. *See* Laurin, *supra* note 14, at 711-12.

¹⁸⁰ Leon, 468 U.S. at 919.

¹⁸¹ U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

reasonably believe to be legal.¹⁸² This too is a non sequitur, and as a consequence proves too much. If the target for exclusionary deterrence was officers who will act in objective good faith, then there would be no reason to inflict exclusion in any case regardless of the culpability of the offending officer. Officers who are committed to obey the Fourth Amendment are not the audience for exclusion as a deterrent, however. The audience for exclusion is, rather, officers who may be tempted in the future to violate or risk violating the Fourth Amendment.¹⁸³ Hart's point, equally applicable here, is that there is no reason to think that the threat generated by excluding evidence in cases like *Leon* would not reach these officers.¹⁸⁴ Contrariwise, there are good reasons to worry that the provision of a general excuse will compromise the deterrent message of the exclusionary rule and its overall effects on law enforcement.¹⁸⁵

Although the Court has never recognized much less addressed these concerns, ¹⁸⁶ one response it might make is that deterrent threats generated by enforcing the exclusionary rule against officers who commit good faith violations of the Fourth Amendment are directed only or principally toward officers who will make good faith efforts to respect Fourth Amendment rules in the future and, therefore, inflicting exclusion in good faith cases would "in no way affect [their] future conduct unless it is to make [them] less willing to do [their] duty." The metaphysics and epistemology

¹⁸² Id. at 920-21. See also Laurin, supra note 14, at 709. I am in debt to Chris Slobogin for conversations on this point.

¹⁸³ See Stone, 428 U.S. at 492; Leon, 468 U.S. at 963-64 (Brennan, J., dissenting).

¹⁸⁴ Mertens & Wasserstrom, *supra* note 60, at 396–97 (pointing out that by virtue of the "warden's fallacy," the deterrent effect of the exclusionary rule is masked by the fact that the illegal searches it prevents are by definition invisible).

¹⁸⁵ See New York v. Harris, 1640 U.S. 13, 31-32 (Marshall, J., dissenting) (describing how categorical rule prohibiting exclusion of confessions secured during interrogations outside the home after an initial violation of *Payton v. New York*, 445 U.S. 573 (1980), "creates powerful incentives for police officers to violate the Fourth Amendment").

¹⁸⁶ This is not for lack of opportunity. Justice Stevens set forth the basic outlines of the problem in his concurring opinion in *Dunaway vs. New York*, where he responded to a deterrence-based critique made by Justice Rehnquist and Chief Justice Burger in their dissent. 442 U.S. 200, 221 (1979) (Stevens, J, concurring).

¹⁸⁷ See Leon, 468 U.S. at 920-21. See also Laurin, supra note 14, at 710.

underlying such a response are bizarre to say the least. There is simply no reason to think that the Court's deterrent messages would or could be broadcast so narrowly. It is not as if the Federal Communication Commission has set up dedicated frequencies that courts use to broadcast targeted messages to select groups of officers. Rather, the courts' messages in exclusionary rule cases are broadcast generally to all law enforcement officers and their agencies.¹⁸⁸

By way of further response, one might argue that universal enforcement of the exclusionary rule is not necessary to alter law enforcement's practices and institutional values.¹⁸⁹ This is, of course, an empirical claim¹⁹⁰ that would require support, but let us assume *arguendo* that the deterrence effects of the exclusionary rule could be preserved if it was enforced in, say, eighty-percent of cases. If instances of good faith violations comprise less than twenty percent of suppression cases, then maintaining the good faith exception would not seem to pose a threat to deterrence goals. The problem with this argument is that, absent reliance on the spectacular non

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¹⁸⁸ See Stone, 428 U.S. at 492; Leon, 468 U.S. at 919; Leon, 468 U.S. at 963–64 (Brennan, J., dissenting). As the Court put the point in Stone, rigorous and regular enforcement of the exclusionary rule encourages institutional reform and the incorporation of Fourth Amendment commitments into the "value system" of law enforcement agencies. Stone, 428 U.S. at 492. See also Kamisar, supra note 5, at 659-61 (pointing out the value of the exclusionary rule in effecting "systemic deterrence"); Oaks, supra note 117, at 756. The benefits to citizens of institutional reform in the shadow of the exclusionary rule are not a matter of speculation. A few years before Mapp, the California courts adopted the exclusionary rule after decades of failed experiments with alternative remedies. See People v. Cahan, 282 P.2d 905 (Cal. 1955). A few years later the chief law enforcement officer in California cited the extraordinary results in terms of reduced Fourth Amendment violations and increased training and professionalism among the ranks of state officers. Elkins, 364 U.S. 219–21. Although it is common among jurists and critics to suggest that institutional values shared among law enforcement agencies today render the exclusionary rule obsolete, officers remain players in the "often competitive enterprise of ferreting out crime," suggesting that we would be foolish indeed to kick out from under us a ladder we are still standing on. See Herring, 555 U.S. at 152–53 (Ginsburg, J., dissenting); MICHAEL AVERY, DAVID RUDOVSKY, & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION, at v n.1 (3d ed. 2009) (characterizing the Court's reliance on them for the proposition that law enforcement agencies are sufficiently professionalized so as to render the exclusionary rule unnecessary "highly misleading"); Steiker, supra note 9, at 834-38, 849 (documenting legislative and administrative failures to curb police corruption, brutality, and illegality outside the shadow of the exclusionary rule); Bloom & Fentin, supra note 3, at 68.

¹⁸⁹ See, e.g., Friendly, supra note 130, at 953. Chief Justice Roberts also alludes to this response in Herring, 555 U.S. at 143–44.

¹⁹⁰ And a dubious one at that. *See, e.g., Elkins*, 364 U.S. at 219–21 (quoting *Cahan*, 282 P.2d at 913, for its conclusion that "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.").

sequitur or retributivist principles, it offers no reason why the culpability of the offending officer should play a role in selecting the twenty percent of cases courts can afford to overlook. We could just as well pick at random and still maintain full deterrence. Better still, if the primary costs of exclusion accrue in the form of compromised truth seeking and releasing dangerous criminals, then overall utility would be better preserved by barring exclusion in the twenty percent of cases where suppression would most dramatically affect truth seeking or result in the release of the most dangerous criminals. Thus, noting that exclusion need not be enforced in all cases in order to produce a significant deterrent effect does nothing to advance the cause of a general deterrence-based good faith exception. Rather, it argues for case-by-case selection based on discrete balancing of costs and benefits. Page 192

Defenders of a deterrence-only approach might press the point a bit further, arguing that inflicting exclusion in cases where officers have acted in good faith carries additional costs because it reduces incentives to respect the Fourth Amendment.¹⁹³ Ronald Dworkin might describe this as the sort of "whistling-in-the-dark speculation that is often used to save consequentialism from embarrassing implications."¹⁹⁴ Specifically, it is hard to see how officers who make good faith attempts to obey the Fourth Amendment would be led to act in bad faith simply because they sometimes make mistakes and suffer the consequences. The more likely result would be some

¹⁹¹ See Bloom & Dewey, supra note 15, at 15–16 (noting that this is the approach adopted by the New Zealand courts when contemplating exclusion).

¹⁹² See Amar, supra note 9, at 801–11 (arguing that Fourth Amendment reasonableness is inherently a case specific inquiry).

¹⁹³ Slobogin, *supra* note 8, at 383–84, 388–89, 411. *See also Leon*, 468 U.S. at 920 (quoting Justice White's dissenting opinion in *Stone v. Powell* for the proposition that excluding evidence seized as a consequence of good faith violations will make future officers "less willing to do [their] duty"). I am grateful to Deborah Hellman for pressing this point.

¹⁹⁴ RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 294 (2011).

additional caution,¹⁹⁵ which is all to the good unless the goal is to incentivize negligence or recklessness.¹⁹⁶ There may be some hapless officers who become frustrated because, despite their best efforts, they time and again violate the Fourth Amendment. Surely these are rare cases, however, so would not warrant creating a general policy. Moreover, a judicial policy of granting carte blanche to the Fourth Amendment Barney Fifes¹⁹⁷ of the world would be odd indeed, both because it would eliminate "the incentive of law-enforcement agencies to take measures to minimize good-faith violations" and because it would offer a readily available strategy of malingering to officers who are not so well-intentioned.¹⁹⁹

The disincentive response is no more persuasive when applied to the general audience of law enforcement officers. We can certainly imagine that officers who hear through the grapevine about an unlucky colleague whose evidence is suppressed because a magistrate improvidently issued an illegal warrant might well think the result unfair. They might even say things like "What's the point if the judge is just going to mess it up!?" For at least two reasons, however, such reactions cannot underwrite a general exception to the exclusionary rule.

First, as Justice Stevens points out in his opinion in *Leon*, getting a warrant is not and never has been a guarantee that a subsequent search would be constitutional.²⁰⁰ To the contrary, a principal purpose of the Fourth Amendment at its inception was to prohibit general warrants, which

¹⁹⁵ See Mertens & Wasserstrom, supra note 60, at 419–23 (recounting the record of officer who, despite being punished by suppression several times "has continued to operate right at, and frequently just over, the constitutional line").

¹⁹⁶ Brooks, *supra* note 130, at 46; Posner, *supra* note 11, at 68; Traynor, *supra* note 60, at 322.

¹⁹⁷ See Transcript of Oral Argument at 20, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513) (counsel for petitioner referring to the bumbling deputy played by the brilliant Don Knotts on *The Andy Griffith Show*).

¹⁹⁸ Posner, supra note 11, at 68.

¹⁹⁹ See Harris v. New York, 495 U.S. 14, 31–32 (1990) (Marshall, J., dissenting).

²⁰⁰ See Leon, 468 U.S. at 969-72.

provided judicial authority for state agents to engage in wide-ranging and unfettered searches.²⁰¹ As Justice Stevens pointed out, "[t]he fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct 'reasonable.'"²⁰² The risk that a warrant may not be constitutional certainly urges caution on law enforcement officers, encouraging them to take care in developing probable cause and to scrutinize warrants for form, but caution is hardly a bad thing where treasured constitutional rights are at stake.

Second, inflicting exclusion in good faith cases does not change the incentive structure for officers in the field. By hypothesis, an officer's goal is to find and secure evidence that will be admissible at trial. Given that goal, an officer presented with two possible courses of conduct—one that violates the Fourth Amendment and the other that seems not to—still has every reason to put in her best efforts. After all, if she elects to knowingly violate the Fourth Amendment, then she is virtually guaranteed that her law enforcement goals will be frustrated. Alternatively, if she makes a good faith effort to obey the Fourth Amendment, then there are two possibilities. First, she might actually succeed in conducting a lawful search and seizure, in which case she will succeed in her law enforcement purpose. Second, she may be unlucky and, despite her best efforts, end up violating the Fourth Amendment, in which case the exclusionary rule might frustrate her goals. The rational course here is obvious. At the worst, an officer making a good faith effort to obey the Fourth Amendment runs the risk that her efforts will fail. Even if the risk of failure is very high, say fifty percent, the balance of costs and benefits would still weigh heavily on the side of making a good faith effort. In truth, however, the risk of failure is usually quite low. In the vast majority of cases, officers who make good faith efforts to respect the Fourth Amendment end up carrying out searches and seizures that are actually reasonable. Although those efforts sometimes fail, no rational

²⁰¹ Kamisar, *supra* note 5, at 571–81; Amar, *supra* note 9, at 772.

²⁰² Leon, 468 U.S. at 972.

law enforcement officer would decline the surpassingly high-percentage bet on good faith efforts in favor of the guaranteed loser of contumacious or reckless disregard just because she heard a colleague's hard luck story.

It is possible that law enforcement officers are not so "rational" in the abstract sense that utilitarians might use the word. They may carry around with them a sense of fair play that is offended by enforcing the exclusionary rule in good faith cases. Sharon Davies has made an argument along these lines, suggesting that inflicting the exclusionary rule in cases where officers act in good faith might erode official faith in the Fourth Amendment and its enforcement. These concerns turn, however, on her contention that the exclusionary rule "is designed to communicate society's view that police violations of constitutional rights are wrongful and prohibited. This condemnatory justification of punishment is, of course, a classic retributive justification of punishment, defended most recently by Dan Markel and Chad Flanders. Thus, the sentiments of law enforcement officers that concern Davies, although understandable, appeal not to considerations of rational utility, but to moral considerations linked to retributivist conceptions of just punishment. To appeal to these sorts of principled concerns would require courts to abandon a deterrence-only approach in favor of committed respect for the retributivist principles underlying those law enforcement sentiments. Whether that commitment to principle is authentic or merely practical, the result would be the same: adoption of the hybrid approach promoted here.

Another response along these lines is that imposing exclusion in good faith cases might constitute "overdeterrence," and therefore stand as a disincentive against aggressive law

²⁰³ Davies, *supra* note 13, at 1329-34.

²⁰⁴ *Id.* at 1336.

²⁰⁵ See Markel & Flanders, supra note 25.

²⁰⁶ Laurin, supra note 14, at 700.

enforcement in marginal cases.²⁰⁷ *Leon* provides a helpful example. If officers have exhausted their investigative resources but remain uncertain as to whether they have enough to establish probable cause, then preserving the exclusionary rule as a sword of Damocles over their decisions to apply for a warrant might act as a disincentive against applying for a warrant. This might compromise legitimate law enforcement interests either by encouraging officers to abandon investigations altogether or by pushing them from relatively low-cost search strategies to more expensive, time-consuming, and less efficient investigative strategies.²⁰⁸ As Jennifer Laurin has pointed out, this response has a sort of "heads-I-win, tails-you-lose quality" in that the Court would be caught claiming both that "the exclusionary rule generated zero deterrence in the case of objectively reasonable missteps; but [that] *if* it did in fact deter, [then] this [must] now be understood as an undesirable *cost* of the rule."²⁰⁹

Beyond these accusations of argumentative foul, it is clear that, unless the Court wants to incentivize reckless conduct by law enforcement, overdeterrence concerns do not take us very far. For officers who truly believe that they have gathered sufficient evidence to establish probable cause there is nothing to chill. They will and should go forward, though always with the knowledge that there are no guarantees. If an officer knows that there is a substantial risk that going forward with a search may very well result in a Fourth Amendment violation, then he proceeds not in good faith but recklessly. Although we may want officers weighing the risks in these circumstances to sometimes roll the dice out of an interest in aggressive law enforcement, surely we want it to be a

²⁰⁷ Posner, *supra* note 11, at 55; United States v. Williams, 622 F.2d 830, 842 (5th Cir. 1980) (en banc).

²⁰⁸See Atkins & Rubin, supra note 117. I thank Dan Markel for pressing this point.

²⁰⁹ See Laurin, supra note 14, at 710.

²¹⁰ See Leon, 468 U.S. at 954–56 (Brennan, J., dissenting); Brooks, supra note 130, at 46; Kamisar, supra note 5, at 662–64; Mertens & Wasserstrom, supra note 60, at 388 (with an expanded set of excuses, officers "may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off"). The good faith exception also withdraws a deterrent threat against magistrates. See id. at 956–57.

risk. The alternative would actually distort the law by subsidizing searches at the expense of Fourth Amendment rights. That subsidy would also eliminate constitutionally proper incentives for officers to take reasonable steps beyond what is necessary to avoid a charge of intentional or knowing violation—a very low hurdle indeed. By removing any possibility of condemning reckless conduct, this approach would also convert the exclusionary rule from a sanction to a mere pricing mechanism in many cases,²¹¹ further compromising the balance between citizen and law enforcement interests demanded by the Fourth Amendment.²¹² The same responses go equally for any argument that the real message to law enforcement sent by the exclusionary rule should be "Just do your best." Were the Court to adopt such a view it would effect a substantive change on the Fourth Amendment itself.²¹³ Marking a distinction between rights and remedies offers no response. In combination with qualified immunity on the tort side, a "best efforts" approach to the good faith exception would violate Chief Justice Marshall's principle that "every right, when withheld, must have a remedy."²¹⁴

The "best efforts" approach to the Fourth Amendment would also distort the Fourth

Amendment in the other direction by expanding the scope of the exclusionary rule to cover officers

²¹¹ Davies, *supra* note 13, at 1291–92, 1303–08, 1318–19. As Davies points out, the language of the Fourth Amendment, which bars categorically all unreasonable searches and seizures, excludes a pricing approach to the exclusionary rule. *See id.* at 1294. *See also* 18 U.S.C. § 2236 (amending 18, U.S.C., 1940 ed., Sec. 53a (Aug. 27, 1935, ch. 740, Sec. 201, 49 Stat. 877)) (providing for criminal prosecution of state agents who violate the Fourth Amendment); Brooks, *supra* note 130, at 45–46 (noting that "what distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation" (citation and internal alterations omitted)).

²¹² See Leon, 468 U.S. at 956–57 (Brennan, J., dissenting); Leon, 468 U.S. at 974–76 (Stevens, J., concurring in part and dissenting in part) (pointing out that this incentive to recklessness "can only lead to an increased number of constitutional violations," which is, of course directly contrary to the deterrence-only view); Committee on Federal Legislation of the Bar of New York City, Proposed Changes to the Exclusionary Rule, 50 REC. ASSOC. BAR OF N. Y. CITY 385 (1985).

²¹³ See Laurin, supra note 14, at 739–41, Mertens & Wasserstrom, supra note 60, at 430–31; Bloom & Dewey, supra note 15, at 29; cf. Bloom & Fentin, supra note 3, at 66–67 (pointing out that civil remedies for Fourth Amendment violations cannot provide sufficient substantive protections because of qualified immunity).

²¹⁴ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

who act in bad faith but by good fortune do not violate the Fourth Amendment. As an example, imagine that a law enforcement officer intentionally violates the Fourth Amendment rights of a suspect by searching his hotel room without a warrant. At the suppression hearing it comes out that, unknown to the officer at the time, the suspect had actually abandoned the hotel room earlier in the day upon learning that the police were closing in and therefore did not have a property interest²¹⁵ or a subjectively manifested and reasonable expectation of privacy²¹⁶ in the room.

Deterrence goals, as they are presently wielded by the Court, would seem to require exclusion in such a case. It would also effect a material change in the Fourth Amendment itself by providing protection where an officer believes that a suspect has Fourth Amendment rights rather than where he actually has Fourth Amendment rights. As Anthony Amsterdam observed long ago, the Court would never expand the substantive reach of the Fourth Amendment to encompass the subjective beliefs of police officers.²¹⁷ Neither should it work substantive diminishments on the Fourth Amendment to accommodate the beliefs and best intentions of police officers.

In the years since *Leon* the Court has extended and applied the good faith exception several times.²¹⁸ In each of these cases the Court has repeated its misplaced reliance on the spectacular non sequitur. Having exposed this gap it is tempting to conclude that the Court must abandon the good faith exception altogether. That conclusion would be too fast, however. The resources necessary to justify the good faith exception reside in the hybrid approach to the exclusionary rule outlined in Part II. In contrast with deterrence-only approaches, retributivism is conceptually married to

²¹⁵ United States v. Jones, No. 10-1259, slip op. 5-6 (Jan. 23, 2012).

²¹⁶ Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

²¹⁷ Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 368 (1974).

²¹⁸ See, e.g., Davis v. United States, 131 S. Ct. 2419 (2011); Herring v. United States, 555 U.S. 135 (2009); Arizona v. Evans, 514 U.S. 1 (1995); Illinois v. Krull, 480 U.S. 340 (1987); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

culpability as a necessary component of desert.²¹⁹ As a consequence of this commitment, retributivism and the common law have long held out an excuse in circumstances where an offender acts out of a mistake of fact and, in some circumstances, a mistake of law.²²⁰ As Robinson and Darley have argued, retributivism's commitment to punish only where the conditions of moral responsibility have been met also increases compliance with the law because it reaffirms for law's subjects a commitment to basic fairness in legal process.²²¹ There is a hint of irony in making this point in the present context,²²² but it should not linger. After all, the argument here is not that the good faith exception should be abandoned because it is not supported by deterrence considerations. Rather, the point is that in order to preserve the good faith exception the Court must reaffirm commitments to retributivist principle that were critical to the exclusionary rule at its genesis. Whether that commitment is made out of principle or practicality, the doctrinal consequences are the same: reasonable mistakes of fact will provide an excuse.

Maryland v. Garrison presents an almost textbook case of reasonable mistake of fact in the Fourth Amendment context.²²³ There officers had probable cause to believe that evidence of a drug crime would be found in the "third floor apartment." After an extensive investigation the officers believed reasonably that there was but one third floor apartment and received a warrant on that basis. They were wrong. There were two third floor apartments accessible via a shared hallway

²¹⁹ See Gray, supra note 22, at 1642.

Excuses for reasonable mistakes of fact trace back at least to Aristotle, who in his Nicomachean Ethics describes the pity we ought to have for Metrope, who mistakes his son for an enemy at war and kills him. ARISTOTLE, NICOMACHEAN ETHICS, bk. III, chap. 1 (W.D. Ross ed. & trans., 1989). For an extended discussion of mistakes of fact and mistakes of law, see David Gray, An Excuse-Centered Approach to Transitional Justice, 74 FORDHAM L. REV. 2621, 2652–57 (2006). William Mertens and Silas Wasserstrom would object to excusing any mistakes on practical grounds. See Mertens & Wasserstrom, supra note 60, at 428.

²²¹ See supra notes 150-152 and accompanying text.

²²² I am in debt to Chris Slobogin for pressing this point.

²²³ 480 U.S. 79 (1987). The issue in *Garrison* was whether there was a Fourth Amendment violation in the first place rather than a remedy question, but the character of the mistake is nevertheless illuminating in the current context.

secured from the public areas of the building by a locked door. As a consequence of this mistake officers ended up standing in Garrison's living room without legal authority to be there. Because that unlawful entry was a consequence of a reasonable mistake of fact, the Court declined Garrison's motion to suppress the drug paraphernalia seized from his apartment.²²⁴ *Leon* is also a mistake of fact case. There, officers reasonably believed that they held a lawful warrant issued by a detached and neutral magistrate based on probable cause when, in fact, probable cause did not exist.²²⁵

Mistakes of law are a bit more difficult, but still recommend the hybrid approach's principled analysis. In the common law and most statutory systems, mistakes of law do not excuse.²²⁶ There are exceptions, however, for reasonable reliance on statements of law issued by legislatures, courts, or executive agents with authority over the law or its interpretation.²²⁷ So, in cases like *Illinois v*. *Krull*²²⁸ and *Michigan v*. *DeFillipo*,²²⁹ where officers relied on state statutes later held to be unconstitutional, a principled approach would bar punishment.²³⁰ So too in *Davis v*. *United States*,²³¹ where officers relied on a stable, long-standing, and final decision of the circuit court of appeals with

²²⁴ Id.

²²⁵ Whether probable cause exists is surely a fact with legal dimension, but making a mistake of legal fact provides no less an excuse than making a mistake of circumstantial fact. See, e.g., Cheek v. United States, 498 U.S. 192 (1991) (reasonable mistake as to whether income constituted "income" under the tax laws provides defense against tax evasion); Morissette v. United States, 342 U.S. 246 (1952) (reasonable mistake as to legal ownership of property provides defense against theft charge).

²²⁶ Ervin, *supra* note 41, at 297.

²²⁷ See Wayne Lafave, Criminal Law § 5.6(e) (4th ed. 2003).

²²⁸ 480 U.S. 340 (1987).

²²⁹ 443 U.S. 31 (1979).

²³⁰ LAFAVE, *supra* note 227, § 5.6(e), (e)(1).

²³¹ Davis v. United States, 131 S. Ct. 2419 (2011) (declining to impose exclusion in cases where officers relied on a circuit case interpreting and applying *New York v. Belton*, 453 U.S. 454 (1981), which held sway for more than two decades until *Arizona v. Gant*, 556 U.S. 332 (2009)). For an argument that *Davis* should have been decided differently on deterrence grounds, *see* Kerr, *supra* note 60.

jurisdiction over them.²³² In such cases, inflicting punishment would violate the legality principle and its embedded prohibition against ex post facto enforcement of new law.²³³ By contrast, the mistake of law committed by the officer in *United States v. Williams*²³⁴ should not have been excused. In that case the arresting officer observed Williams, who had been released on bail, in an airport outside of Ohio in violation of the terms of her bail. Based on a misunderstanding of federal law, the officer believed that Williams was guilty of bail jumping, arrested her, and pursuant to a search incident to arrest, discovered a small amount of heroin. As the Court itself has held, it is both illegal and unreasonable for law enforcement officers to effect arrests based on conduct that is not, in fact, a crime.²³⁵

The promise of clarity and a familiar analytic structure borrowed from the common law surely would be welcome. In June 2011 the Court granted certiorari in *Messerschmidt v. Millender* to answer the question whether "the *Malley/Leon* standards [should] be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?" This question has both doctrinal and pedagogical dimensions. In answer, the Court might choose to yell loudly at its pupil courts. Alternatively, it might ask hard questions about the lessons it has tried to teach. If this Article is right, and the

²³² Davis, 131 S. Ct. at 2429. Here the Court could have tethered its opinion to *United States v. Albertini*, 830 F.2d 985 (1987), and *United States v. Rogers*, 466 U.S. 475 (1984), which stand for the rule that mistakes of law made in reasonable reliance on final decisions by courts of appeals can provide excuses, at least where there is no reason to suspect that the decisions relied upon are controversial or likely to be overturned. *See also* LAFAVE, *supra* note 227,

§ 5.6(e)(3).

²³³ See, e.g., Kerr, supra note 60, at 1097 ("It would be inconsistent with the constitutional prohibition on ex post facto laws to punish the police for conduct that was deemed legal at the time it occurred."); Kamisar, supra note 5, at 630. For an extensive discussion of the legality principle, see Gray, supra note 220, at 2636–49.

²³⁴ 594 F.2d 86 (5th Cir. 1979), rev'd en banc 622 F.2d 830 (5th Cir. 1980) (per curiam).

²³⁵ See Devenpeck v. Alford, 543 U.S. 146 (2004). See also People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987).

²³⁶ Petition for Writ of Certiorari at i, Messerschmidt v. Millender, No. 10-704 (Nov. 22, 2010), *cert. granted*, 131 S. Ct. 3057 (2011).

Court's current doctrine is incoherent and insufficiently reasoned, then it should be no surprise that it is also hard to apply and produces unpredictable results. The best course is therefore to change course.

Although another article could be written exploring the fine details, the foregoing is sufficient to defend the core claim that deterrence considerations alone are not sufficient to justify a general good faith exception to the exclusionary rule. By contrast, an approach to the exclusionary rule that respects its principled roots can support a good faith exception without indulging the spectacular non sequitur or engaging in unfounded and incoherent speculation. Proponents of the Court's current deterrence-only approach to the Fourth Amendment exclusionary rule therefore face a choice: abandon the good faith exception or embrace the hybrid approach to the Fourth Amendment exclusionary rule described in Part II.

B. The Cause Requirement

Among the most important components of the Supreme Court's Fourth Amendment exclusionary rule jurisprudence is the requirement that a defendant show a causal connection between an alleged constitutional violation and the discovery and seizure of the evidence he seeks to suppress.²³⁷ In light of the Court's contemporary commitment to focus exclusively on deterrence when justifying exclusion in Fourth Amendment cases, it is not surprising to see attempts to link the cause requirement to the deterrence rationale.²³⁸ For example, the majority opinion in *Hudson v. Michigan* proceeds from the assumption that the exclusionary rule is "applicable only . . . where its deterrence benefits outweigh its substantial social costs."²³⁹ Relying in part on *Hudson*, the editors of one leading criminal procedure textbook claim that "[d]eterrence is unjustified in the absence of [a]

²³⁷ See, e.g., Hudson v. Michigan, 547 U.S. 586, 592–94 (2006).

²³⁸ See, e.g., United States v. Ceccolini, 435 U.S. 267, 273–80 (1978).

²³⁹ 547 U.S. at 591 (internal citations and quotation marks omitted).

causal link."²⁴⁰ As in the case of the good faith exception, however, closer examination of the argument underlying that conclusion reveals that deterrence considerations cannot justify a general cause requirement without indulging a non sequitur. It is therefore incumbent upon the Court to either abandon its categorical cause requirement or to adopt the hybrid approach outlined in Part II.

The cause requirement has a long history in the Court's Fourth Amendment exclusionary rule jurisprudence.²⁴¹ Sounding in cause-in-fact and proximate cause requirements in the common law of torts and the criminal law, the Fourth Amendment cause requirement will bar exclusion where there is no "but for" causal connection between a Fourth Amendment violation and later discovery of evidence or where that connection is sufficiently "attenuated." The doctrine, which is often referred to using Justice Frankfurter's phrase "fruit of the poisonous tree," can act as either sword or shield. For example, in *Wong Sun v. United States* the Court held that evidence against defendant James Toy that had been "come at by the exploitation of" an unlawful entry must be suppressed. By contrast, the Court held that a confession given by defendant Wong Sun should not be suppressed, despite the fact that he was subject to unlawful arrest, because he was released and later returned to the police station on his own initiative to volunteer his confession. Justice Brennan, writing for the Court, justified that holding on grounds that Wong Sun's independent acts

²⁴⁰ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 557 (2010).

²⁴¹ See, e.g., Brown v. Illinois, 422 U.S. 591, 597–600 (1974); Wong Sun v. United States, 371 U.S. 471, 484–71, 491 (1962); Nardone v. United States, 308 U.S. 338, 341 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

²⁴² See Nardone, 308 U.S. at 341.

²⁴³ *Id*.

²⁴⁴ 371 U.S. 471, 487–88 (1962).

²⁴⁵ *Id.* at 491.

broke the causal chain, "attenuat[ing]" the connection between the constitutional violation and his confession and thereby "dissipat[ing] the taint" of the unlawful arrest.²⁴⁶

Important in its own right, the cause requirement has also given birth to several subsidiary doctrines, including inevitable discovery and the independent source rule.²⁴⁷ These doctrines offer police and prosecutors ways to avoid suppression by arguing or creating attenuation. For example, in *Nix v. Williams* the Court held that evidence linked to law enforcement's discovering the body of Williams's ten-year-old victim need not be suppressed, even though that discovery was the immediate result of a confession taken in violation of the Fifth Amendment, because the search pattern officers were pursuing when the confession was taken would inevitably have led to timely discovery of the body.²⁴⁸ Similarly, in *Segura v. United States* the Court held that evidence seized during an unwarranted search of defendant's apartment could be admitted at trial because, at the time of the search, officers were in the midst of applying for a warrant; that warrant was issued on independent evidence without reference to anything discovered during the illegal search; and the subsequent warranted search led to discovery of the same evidence.²⁴⁹ In these cases, credible claims of inevitable discovery and independent source may not, strictly speaking, break or attenuate the causal chain in a physical or spatial sense. They do, however, serve to cleanse the taint of law enforcement wrongdoing.

The cause requirement was established as a key component of Fourth Amendment law early on and solely in reference to the principles that grounded the exclusionary rule from its inception.²⁵⁰

²⁴⁶ *Id.* (citations and internal quotation marks omitted).

²⁴⁷ Kerr, *supra* note 60, at 1099–1100.

²⁴⁸ 467 U.S. 431 (1984).

²⁴⁹ 468 U.S. 796 (1984).

²⁵⁰ See, e.g., Nardone v. United States, 308 U.S. 338, 341 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

The Court did not attempt to justify the cause requirement based on deterrence considerations until 1978 in *United States v. Ceccolini*.²⁵¹ Ceccolini owned a flower shop, which had been under scrutiny for some time by an investigative team of federal and local law enforcement officers on suspicion that Ceccolini was involved in bookmaking. Officer Ronald Biro entered the shop during business hours and chatted for a bit with Lois Hennessey, an employee who was working the front desk. During that conversation Biro picked up an envelope sitting in the cash register, opened it, and discovered money and what appeared to be slips of paper associated with a gambling operation. When asked, Hennessey revealed that the envelope belonged to Ceccolini. Biro reported what he saw to his superiors.

Ceccolini was eventually questioned under oath, denied any knowledge of a gambling operation, was thereafter prosecuted for perjury, and was convicted in part on the testimony of Hennessey. At trial Ceccolini objected to the admission of Hennessey's testimony on grounds that investigators only discovered her testimonial value because Biro searched Ceccolini's envelope and therefore violated his Fourth Amendment rights. The trial court, sitting as the finder of fact, admitted Hennessey's testimony and found Ceccolini guilty. On Ceccolini's renewed motion, the court suppressed Hennessey's testimony as fruit of Biro's Fourth Amendment violation and set aside its own verdict. This odd procedure allowed the government to appeal, which it did. The Second Circuit affirmed; but the Supreme Court reversed.

Writing for the Court, Justice Rehnquist advanced two deterrence-related arguments. First, he contended that "[t]he greater the willingness of the witness to freely testify the greater the likelihood that he or she will be discovered by legal means and concomitantly the smaller the incentive to conduct an illegal search to discover the witness." Second, Rehnquist argued that,

²⁵¹ 435 U.S. 267, 273 (1978).

²⁵² *Id.* at 276.

because there was "not the slightest evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on any illicit gambling operation . . . [a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro." Both of these arguments rely on the spectacular non sequitur and lead to absurd consequences.

To again paraphrase Hart, although it may be true that *threats* of suppression did not reach Biro because his subjective intention was not to search for evidence or witnesses, there is no reason to believe that actual infliction of exclusion against him would not deter him and other officers from future Fourth Amendment violations. Quite to the contrary, there is good reason to believe that preserving the cause requirement in cases like *Ceccolini* diminishes dramatically the general and systemic deterrent effects of the exclusionary rule by preserving incentives for officers to engage in routine, casual Fourth Amendment violations.²⁵⁴

Focusing for a moment on these incentives, consider the Court's claim that willing witnesses inevitably will be discovered. Police officers are not soothsayers.²⁵⁵ Absent powers of prognostication, officers therefore have an abiding motivation to violate the Fourth Amendment in order to discover and secure evidence, including potential witnesses.²⁵⁶ By arming officers with the foreknowledge that, if their primary investigative goal is to identify potential witnesses then the exclusionary rule will not apply, *Ceccolini* grants officers carte blanche to violate the Fourth

²⁵³ *Id.* at 279–80. *See also id.* at 283–84 (Burger, C.J., concurring) (in order to inflict exclusion, "The officer must be cognizant of at least the possibility that his actions—because of the possible suppression—will undermine the chances of convicting a known criminal.")

²⁵⁴ As Judge Traynor pointed out, these systemic concerns provide the most compelling deterrence justification. *See* Traynor, *supra* note 60, at 322.

²⁵⁵ See Ceccolini, 435 U.S. at 288 (Marshall, J., dissenting).

²⁵⁶ Johnson v. United States, 333 U.S. 10 (1948).

Amendment in the pursuit of witnesses.²⁵⁷ There is nothing on the face of *Ceccolini* that bars officers from effecting warrantless entries into homes in order to identify parties who might later be persuaded to be willing witnesses.²⁵⁸ These kinds of fishing expeditions are excluded in the Fifth Amendment context,²⁵⁹ but on the logic of *Ceccolini* are encouraged in the Fourth Amendment context.²⁶⁰ Following the Court's logic a bit further, there is no reason that any physical evidence discovered in plain view²⁶¹ during unreasonable searches for witnesses would not also be admissible. After all, by hypothesis, neither the offending officers nor those similarly situated would be deterred from future witness-discovery motivated violations of the Fourth Amendment by suppression of serendipitously discovered physical evidence.²⁶² Although seemingly fantastical, several circuit courts of appeals have rendered holdings along exactly these lines in the context of the collateral use exception to the exclusionary rule that applies in immigration proceedings.²⁶³ These courts have allowed evidence illegally seized during immigration investigations to be admitted during criminal

²⁵⁷ The *Ceccolini* majority alludes to the possibility that its "analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses," but does not say how or why. 435 U.S. at 276 n.4. At any rate, subsequent cases, such as *United States v. Payner*, 447 U.S. 727 (1980), suggest that an illegal search motivated by a hope that witnesses will be discovered would not come out any differently. *See infra* notes 322-331 and accompanying text.

²⁵⁸ Chief Justice Burger anticipates this possibility in his concurring opinion in *Ceccolini*, 435 U.S. at 284 n.4, where he claims not to be able to conceive such a circumstance. His lack of imagination is striking given the Court's constant description of law enforcement officers as strategic players engaged in the "often competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. at 14. Regardless, the Chief Justice's fallback position, which would punish officers based on their "motivation[s]" has since been roundly rejected. *See* Whren v. United States, 517 U.S. 806 (1996).

²⁵⁹ See United States v. Hubbell, 530 U.S. 27 (2000).

²⁶⁰ For a similar argument, see New York v. Harris, 495 U.S. 14, 31–32 (1990) (Marshall, J., dissenting) (describing how categorical rule prohibiting exclusion of confessions secured during interrogations outside the home after an initial violation of *Payton v. New York*, 445 U.S. 573 (1980), "creates powerful incentives for police officers to violate the Fourth Amendment").

²⁶¹ Horton v. California, 496 U.S. 128 (1990).

²⁶² Any hope that this brand of intentional exploitation of an exception to the exclusionary rule might be punished was extinguished in *United States v. Payner*, 447 U.S. 727 (1980). *See infra* notes 322-331 and accompanying text.

²⁶³ See, e.g., United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007); U.S. v. Olivares-Rangel, 458 F.3d 1104, 1116 (10th Cir. 2006). For an extended discussion of these cases Gray, Cooper, & McAloon, supra note 4.

trials on the theory that the offending officers were focused on immigration enforcement, not criminal enforcement, and therefore could not be deterred by the threat of suppression because the exclusionary rule does not apply in immigration proceedings.²⁶⁴ Such are the vagaries of the spectacular non sequitur.

Now consider the *Ceccolini* Court's assertion that suppression would serve no deterrent purpose because there was no evidence that Biro "entered the shop or picked up the envelope with the intent of finding tangible evidence." There was no claim that Officer Biro made an honest mistake of fact or otherwise did not believe that he was violating the Fourth Amendment. Rather, the picture drawn is of an officer who committed a casual violation of the Fourth Amendment out of nosiness or bored curiosity and just got lucky. The Court's suggestion that hapless snoops should be forgiven their transgressions accomplishes the remarkable task of actually incentivizing officers to make a habit of casual Fourth Amendment violations. Although most such violations may not turn up anything interesting, some will; and, the more routine an officer's Fourth Amendment violations, the more credible will be his claim that he was not motivated by an interest in finding evidence if he happens to discover some. As Anthony Amsterdam has pointed out, the Court is at its discretion to simply ignore the logical consequences of its holdings, but that is hardly satisfying from a

²⁶⁴ INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (creating an exception to the exclusionary rule for deportation proceedings).

²⁶⁵ *Id.* at 279-80. *See also id.* at 283–84 (Burger, C.J., concurring) (in order to inflict exclusion, "The officer must be cognizant of at least the possibility that his actions—because of the possible suppression—will undermine the chances of convicting a known criminal.")

²⁶⁶ The damage done to systemic deterrence by incentivizing bad Fourth Amendment practice is particularly dramatic. See Steiker, supra note 9, at 852 (pointing out that the exclusionary rule "creates an alternative vision of the 'good cop").

²⁶⁷ I am in debt to Orin Kerr for pressing this point.

jurisprudential point of view²⁶⁸ and makes it impossible for lower courts to make predictable and clear findings going forward.²⁶⁹

This brief discussion reveals serious flaws in the *Ceccolini* Court's cost-benefit analysis derivative of the spectacular non sequitur. The Court's view in *Ceccolini* is that the marginal benefits of deterring officers in Biro's situation from violating the Fourth Amendment do not outweigh the tremendous costs to society inflicted by excluding from evidence the testimony of witnesses who testify freely.²⁷⁰ This identifies the wrong antecedent. In order to avoid entanglement with the spectacular non sequitur, the Court should have weighed the losses to general and systemic deterrence inflicted by a general cause requirement against the costs to truth seeking in cases where the evidence suppressed is testimony from free-willed, third-party witnesses. The costs to general and systemic deterrence are much more significant than the Court acknowledges in *Ceccolini*. By contrast, the consequent is likely quite small because the number of cases where Fourth Amendment violations lead to the discovery of third-party witnesses who are happy to assist law enforcement is small. The Court therefore appears to strike a balance in exactly the wrong direction, creating broad incentives for officers to violate Fourth Amendment rights and encouraging officers to engage in routine and habitual violations of the Fourth Amendment just to preserve the testimony of a rare witness or two.

The underlying point here draws on the logic of deterrence as a justification of punishment.

The basic deterrence formula describes a ratio between two functions: severity of punishment multiplied by risk of imposition, which is itself a function of risk of detection, certainty of conviction, and swiftness of process, compared to the value of reward multiplied by probability of

²⁶⁸ Amsterdam, *supra* note 213, at 389.

²⁶⁹ See infra Part IV.

²⁷⁰ 435 U.S. at 278–79; *Id.* at 285 (Burger, C.J., concurring).

success: $P_S \times P_R$: $R_V \times R_{PS}$. In general, agents are more likely to refrain from conduct if $P_S \times P_R > R_V \times R_{PS}$. It is immediately clear that nothing in this formulation implies or requires a causal connection between the benefits of an offense and the interests infringed as punishment. To the contrary, all that is necessary is that threats of punishment entail the risk of losing something that is valued by the offender. The widespread use of fines provides an example.

Many punishment schemes use fines to deter potential offenders. Those fines frequently bear no relationship to the gains sought by offenders when they commit their crimes. True, criminals sometimes profit from their offenses. In these cases, seizing ill-gotten gains may sometimes constitute part of the punishment; however, simply seizing the fruits of crime is not "punishment" from a deterrence point of view. After all, if the only consequence of getting convicted of bank robbery is the loss of monies taken during the robbery, then there is no reason from an offender's point of view not to rob the bank. He literally has nothing to lose. If he gets away with it, he keeps the cash; if he is caught then he is sent back to his status quo ante with only

²⁷¹ See Lammon, supra note 167, at 1121–22; Davies, supra note 13, at 1292, 1320; Becker, supra note 29, at 176. Richard Posner has recommended a different formula replacing reward to the offender with harm to the victim. See Posner, supra note 11, at 54–58. That approach misunderstands the purpose of deterrence in these circumstances as pricing rather than sanctioning. See generally Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523 (1984). As Sharon Davies has argued, the language of the Fourth Amendment, which categorically prohibits unreasonable searches, bars the use of a pricing scheme, which would allow law enforcement officers to violate the Fourth Amendment were they prepared to internalize the costs. Davies, supra note 13, at 1289–91, 1293–1315, 1318. Qua sanction, punishments inflicted for violating the Fourth Amendment must therefore be keyed to the benefits accrued to law enforcement as a consequence of their offenses in order to overwhelm incentives to engage in unreasonable searches. Id. at 1320–21.

²⁷² This basic deterrence claim has been subject to considerable empirical challenge, in part because it imagines that criminals weigh the relative risks and rewards of their conduct. *See, e.g.*, Becker, *supra* note 29, at 176. These debates are beyond the scope of this Article, which meets the Court on its own grounds and therefore assumes the basic conceptual validity of deterrence.

²⁷³ Quite to the contrary, this matching of offense and punishment seems singularly retributivist.

²⁷⁴ See United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (holding that asset forfeiture proceedings are not criminal prosecutions and that forfeiture is not punishment).

²⁷⁵ Cf. Becker, supra note 29, at 194.

²⁷⁶ Kamisar, *supra* note 5, at 659. It might be argued that the criminal in this circumstance suffers a loss of opportunity if forced to disgorge the fruits of his crime, but opportunity loss here is vanishingly small as compared to the potential for considerable reward.

minimal opportunity loss. To constitute *punishment* from a deterrence point of view the cost inflicted must exceed the potential gain by an amount sufficient to make the attempt irrational.²⁷⁷ By definition, then, the portion of a fine inflicted as deterrence will bear no causal connection to any gain accrued as a result of the offense.

With this clarification in mind, there is no doubt that the exclusion of evidence in cases where officers commit Fourth Amendment violations would deter those violations regardless of whether there is a causal connection between the violation and seizure of the evidence to be suppressed. The Court has long endorsed the view that police officers are strategic players engaged in the "often competitive enterprise of ferreting out crime." Regardless of what might motivate a particular Fourth Amendment violation, officers in general are, on this view, primarily driven by an interest in detecting crime and arresting and prosecuting offenders. If all Fourth Amendment violations, no matter how detached by motive or fact from the discovery and seizure of evidence, could compromise this primary goal by threatening the success of an arrest and prosecution, then there can be no serious doubt that officers would be deterred. By contrast, maintaining the cause requirement gives effective license to whole classes of Fourth Amendment violations.²⁷⁹

Advocates for a deterrence-only approach to the exclusionary rule might concede that the threat of exclusion has the potential to deter even when the cause requirement has not been satisfied but maintain that the costs to truth seeking and compromised public interests in convicting and punishing offenders are too significant to justify exclusion in the absence of a causal connection.²⁸⁰

²⁷⁷ Were it otherwise, the fine would be nothing more than a pricing scheme. *See* Davies, *supra* note 13, at 1291–92, 1303–08, 1318–19. *Cf.* Becker, *supra* note 29, at 177 (pointing out that even pricing schemes must include a premium at sentencing to account for undetected and unprosecuted crimes).

²⁷⁸ Johnson, 333 U.S. at 14.

²⁷⁹ See Hudson v. Michigan, 547 U.S. 586, 609–10 (2006) (Breyer, J., dissenting).

²⁸⁰ Kerr, *supra* note 60, at 1100. *See, e.g.*, United States v. Herring, 555 U.S. at 141–42 (2009) ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. To the

It is hard to see how such an argument would succeed as a general matter, however. Although a cost-benefit approach may be helpful on the facts of any particular case, it is far too fact dependent to support a general cause requirement.²⁸¹ That is because cause does not seem to bear a general relationship to either costs or benefits of exclusion.²⁸² Among the more relevant considerations would be the value, however measured, of the right at issue, the severity of the defendant's crime,²⁸³ the effect of suppression on the prosecution's ability to convict, the relative weight of general law enforcement interests as compared to the costs of suppression, and the ease and availability of constitutional alternatives to the violation. Given the number and nature of these variables it is hard to see how one could, on deterrence grounds, defend a general cause requirement.²⁸⁴ It is, however, easy to imagine cases where suppression might be a valuable tool even though cause cannot be shown. For example, imagine that an officer uses excessive force while making an arrest for minor drug possession. In such a circumstance the utilitarian calculus might favor suppression despite the absence of cause in order to deter officers from future violence.

extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs.") (internal citations and alterations omitted).

²⁸¹ Bloom & Fentin, *supra* note 3, at 63. *Cf.* Scott v. Harris, 550 U.S. 372, 383 (2007) (pointing out that courts must "slosh our way through the factbound morass of 'reasonableness.")

²⁸² Justice Kennedy concedes as much in *Hudson*, noting that the exclusionary rule might be a sensible remedy even when "detached" from the primary offence if there was evidence of widespread misconduct. 547 U.S. at 604 (Kennedy, J., concurring). That concession entails an admission that the exclusionary rule would deter in these cases.

²⁸³ See John Kaplan, The Limits of the Exclusionary Rule, 26 STAN. L. REV. 1028, 1046 (1974) (arguing for an exception to the exclusionary in "serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups"). Closer examination of cases where the exclusionary rule has terminated prosecutions suggests that these serious cases are rare. For example, Williams v. United States, 594 F.2d 86 (5th Cir. 1979), rev'd en banc, 622 F.2d 830 (5th Cir. 1980) (per curiam), the case that started the good faith revolution, involved a charge of minor drug possession by an addict who was already bound for jail on other charges.

²⁸⁴ Posner, *supra* note 11, at 74–75. *Cf.* Brown v. Illinois, 422 U.S. 590, 608–10 (Powell, J., concurring) (describing a range of fact-dependent variables in assessing whether an illegal arrest "taints" a subsequent confession).

The Court appeared to concede much of this in *Hudson v. Michigan*.²⁸⁵ Police arrived at the home of petitioner Booker Hudson with a warrant to search for drugs and guns.²⁸⁶ The officers serving the warrant knocked on Booker's door, announced themselves, asserted their authority under the warrant, and stated their intention to conduct a search. "[T]hree to five seconds" later officers effected a forced entry and found Hudson sitting in a chair.²⁸⁷ During the search that followed, officers discovered drugs on Hudson's person and a gun tucked in the seat cushion of the chair in which he was sitting. At trial and in his state appeals Hudson alleged that the officers serving the warrant violated his Fourth Amendment rights by failing to provide a "reasonable" period of time for him to appreciate, process, and comply with the officers' demand that he allow them entry.²⁸⁸ The State conceded the Fourth Amendment violation but argued against suppression. Relying on state decisions holding that "knock-and-announce" violations do not justify suppression of evidence, the Michigan courts denied Hudson's motion and subsequent appeal. The Supreme Court affirmed.

Writing for the Court, Justice Scalia held that the exclusionary rule cannot be applied as a remedy for knock-and-announce violations because knock-and-announce violations do not "cause" the seizure of evidence discovered during the subsequent warranted search.²⁹⁰ His logic was simple.

²⁸⁵ 547 U.S. 586, 602 (2006).

²⁸⁶ Id. at 588.

²⁸⁷ Id.

²⁸⁸ This knock and announce rule dates from at least *Semayne's Case*, where Coke reported "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or do other execution of the King's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open doors." 5 Co. Rep. 91a, 91b; 77 Eng. Rep. 194, 195 (1604).

²⁸⁹ See Wilson v. Arkansas, 514 U.S. 927 (1995) (establishing Fourth Amendment requirement that, when serving a warrant, police officers must knock, announce themselves and their intention to search, and provide those in the premises with a reasonable opportunity to cooperate).

²⁹⁰ Id. at 588–90.

The officers had a warrant. They therefore had a right to enter and search Hudson's home. ²⁹¹ It follows that their timely search of Hudson's home pursuant to that warrant did not violate his Fourth Amendment rights. ²⁹² His rights were violated, true, but that violation bore on the manner of the entry, not the entry itself or the subsequent search. ²⁹³ Although the officers' impatience may have inflicted harm to Hudson's property, his sense of security, his composure, and even his modesty, seizure of the evidence was not the "fruit" of that Fourth Amendment violation. The only argument Hudson might have made to the contrary is that if officers had provided him a few more minutes to collect himself, then he would have destroyed or hidden evidence—an unavailing argument to be sure. ²⁹⁴

The Court's deterrence-based justification for the cause requirement is not spelled out in *Hudson*, but the argument seems to be that if offending officers are not motivated by the pursuit of evidence when they decide to violate the knock-and-announce rule, then they will not be deterred by the suppression of any evidence subsequently seized.²⁹⁵ That, of course, is a straightforward instance of the spectacular non sequitur. After all, although officers may not be motivated by an interest in seizing evidence when they violate the knock-and-announce rule, it does not follow that application of the rule would not serve as a significant general deterrent capable of effecting systemic conformance with the knock-and-announce requirement.²⁹⁶ This does not mean that *Hudson* was

²⁹¹ Id.

²⁹² Id.

²⁹³ Id.

²⁹⁴ See United States v. Jones, 214 F.3d 836 (7th Cir. 2000); Slobogin, supra note 8, at 432.

²⁹⁵ *Hudson*, 547 U.S. at 591 (asserting that the exclusionary rule applies "only . . . where its deterrence benefits outweigh its substantial social costs") (internal citations and quotation marks omitted).

²⁹⁶ *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring) ("If a widespread pattern of [knock and announce] violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern" that might warrant the remedy of exclusion.); *id.* at 608–10 (Breyer, J., dissenting). Although only a few years old, some scholars have already registered concerns that

wrongly decided or that the Court should abandon the cause requirement. Rather, the point is that deterrence alone is not sufficient to justify the cause requirement. Some commitment to retributivist principle is required. Although not forthright in doing so, Justice Scalia appears to concede as much.

Justice Scalia argues in *Hudson* that "[a]ttenuation also occurs when, even in a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."²⁹⁷ He then explains that the citizen interests at stake in knock-and-announce cases—including physical security, protection of property, and "the opportunity to collect oneself before answering the door"—would not be "vindicate[d]" by suppression of evidence.²⁹⁸ This is a curious but revealing move. The notion that exclusion should vindicate a specific Fourth Amendment harm has no footing in a remedial scheme based on deterrence.²⁹⁹ From a deterrence point of view, sanctions are justified solely by their ability to adjust law enforcement conduct going forward. "Vindication" does resonate with personal remedy as a justification for tort claims. However, without scratching in the dirt of what Christopher Slobogin has suggested are spent mines or retracing its steps around the punitive turn, the Court cannot rely

Hudson has led to an increased number of "no-knock" entries and has contributed to the conversion of law enforcement agencies into paramilitary organizations. See Albert W. Aschuler, Studying the Exclusionary Rule: An Empirical Classic, 75 U. CHI. L. REV. 1365 (2008); Jessica M. Weitzman, Note, They Won't Come Knocking No More: Hudson v. Michigan and the Demise of the Knock-and-Announce Rule, 73 BROOK. L. REV. 1209 (2008).

²⁹⁷ 547 U.S. at 593.

²⁹⁸ Id. at 593-94.

²⁹⁹ See Herring v. United States, 555 U.S. 135, 141–42 (2009) ("[T]he exclusionary rule is not an individual right [but] applies only where it results in appreciable deterrence." (citation, alterations, and internal quotation marks omitted)); Laurin, supra note 14, at 716 ("Hudson's conception of attenuation was not only new, but its resonance with a rights-based understanding of the exclusionary rule appeared to conflict with the Court's longstanding commitment to a wholly instrumental approach to the remedy.").

on tort concepts to justify the cause requirement.³⁰⁰ Here again, the hybrid approach outlined in Part II offers a solution.

Although out of place in conversations about deterrence, "vindication" sounds in retributivist imperatives to rebalance the moral universe³⁰¹ and efforts to prevent the Fourth Amendment from being reduced to "a form of words." On this view, exclusion as a form of punishment vindicates Fourth Amendment rights by nullifying violations and thereby giving public form to the rights themselves. An interest in preserving judicial integrity would also support reliance upon the concept of vindication when justifying the cause requirement. After all, if the evidence is not tainted by law enforcement conduct, then admitting that evidence at trial would not require a court to condone a constitutional violation. In combination with more general retributivist commitments to cause as a function of culpable responsibility, these considerations provide ample reasons to maintain a cause requirement. Given the incapacity of deterrence considerations to do the same work, the Court once again faces a clear choice: either abandon the cause requirement or adopt some version of the hybrid approach.

C. The Standing Requirement

The Court has long held that only those who have "standing" ³⁰⁵ may seek to exclude evidence seized in violation of the Fourth Amendment. ³⁰⁶ This limitation dates to days when the

³⁰⁰ Slobogin, supra note 8, at 365.

³⁰¹ See Gray, supra note 22, at 1656–72.

³⁰² Silverthorne Lumber Co. v. United States, 251 U.S. 382, 392 (1920).

³⁰³ HEGEL, *supra* note 137, *§*§ 97–103.

³⁰⁴ See, e.g., Davies, supra note 13, at 1312–13.

³⁰⁵ Since *Rakas v. Illinois*, 439 U.S. 128 (1978), the Supreme Court has urged against the word "standing" in favor of analyzing whether the litigant's personal reasonable expectations of privacy were violated. Courts, practitioners, and scholars have largely ignored this semantic advice while embracing the conceptual clarification. *See* Kerr, *supra* note 60, at 1100 n.96. I shall follow the herd, using "standing" as short hand for whether the proponent suffered a

Fourth Amendment exclusionary rule was grounded in Fifth Amendment prohibitions against compelled self incrimination.³⁰⁷ As the Fourth Amendment exclusionary rule broke free from its Fifth Amendment roots, the Supreme Court was pressed to reject or rethink its attachment to the standing requirement. It chose the latter course. However, as Akhil Amar, among others, has pointed out, "deterrence'... cannot explain the Fourth Amendment standing doctrine," at least not without relying on the spectacular non sequitur. In order to limit the exclusionary rule to cases where the defendant has standing, the Court must therefore rely on some version of the hybrid approach described in Part II.

Requiring a proponent of suppression to demonstrate standing makes perfect sense if exclusion is regarded as a personal remedy. The alternative would be akin to allowing anyone and everyone to sue a tortfeasor without needing to show a credible claim of harm. The intuitive rationality of the standing requirement dissipates, however, with the punitive turn, after which the Court has justified exclusion not as a personal remedy but as a tool for deterring law enforcement officers specifically, generally, and systemically. Justice White summed up the Court's contemporary view in *Alderman v. United States.*³⁰⁹ There he acknowledged the "deterrent values of preventing the incrimination of those whose rights the police have violated," but reported that the Court was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would

violation of his subjectively manifested reasonable expectations of privacy. Dan Solove recently has proposed a more nuanced approach to assessments of Fourth Amendment interest. *See* Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511 (2010).

³⁰⁶ See, e.g., Minnesota v. Carter, 525 U.S. 83 (1998); United States v. Padilla, 508 U.S. 77 (1993); Minnesota v. Olson, 495 U.S. 91 (1990); United States v. Payner, 448 U.S. 911 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960).

³⁰⁷ Kamisar, *supra* note 5, at 634.

³⁰⁸ Amar, *supra* note 9, at 791–92. *See also* Traynor, *supra* note 60, at 335 (explaining why California courts rejected the standing requirement after adopting the exclusionary rule on deterrence grounds).

^{309 394} U.S. 165 (1969).

justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."³¹⁰ Although boasting a surface appeal, this reasoning relies on a version of the spectacular non sequitur. After all, if the goal is deterrence, then what matters is that the officer is punished for his offense. It does not matter from a deterrence point of view who demands that the punishment be inflicted. As we have seen in our discussion of the good faith exception and the cause requirement, then, deterrence considerations cannot fund a general standing requirement.

Not only is the standing requirement not justified by deterrence considerations, it actually frustrates the goal of reducing Fourth Amendment violations by incentivizing law enforcement officers to violate the Fourth Amendment. *United States v. Padilla*³¹¹ provides an example. In *Padilla*, the Court rejected the Ninth Circuit's coconspirator standing doctrine, which allowed each member of a conspiracy against whom the government sought to admit illegally seized evidence to seek suppression regardless of whether that defendant's Fourth Amendment rights were violated. ³¹² Although difficult to defend if the exclusionary rule is regarded as a personal remedy, deterrence would be well and ably served by allowing coconspirators to seek suppression. ³¹³ Contrariwise, deterrence goals would be frustrated without such a rule because officers would retain a significant incentive to violate the Fourth Amendment rights of some conspirators knowing that any evidence seized as a result would be admissible against other conspirators. ³¹⁴ That concern is not limited to members of a conspiracy. As Justice Murphy has pointed out, "to allow the Government to profit

³¹⁰ *Id.* at 174–75.

^{311 508} U.S. 77 (1993).

³¹² *Id.* at 81–82.

³¹³ Amar, *supra* note 9, at 791; Mertens & Wasserstrom, *supra* note 60, at 383–85.

³¹⁴ Traynor, *supra* note 60, at 335.

by its wrong [is] to reduce in large measure the protection of the Amendment,"³¹⁵ because it preserves incentives for strategically oriented officers to violate the Fourth Amendment.³¹⁶ Those incentives are particularly powerful when officers know that there are multiple parties on a premises.³¹⁷

These are the considerations that led the California Supreme Court early on to abandon the standing requirement in Fourth Amendment exclusionary rule cases. In the years before *Mapp*, state courts experimented with both the exclusionary rule and its justifications. The California courts resisted the exclusionary rule for years. Then, in 1955 and in the face of mounting evidence of routine Fourth Amendment violations, the California Supreme Court adopted the exclusionary rule in order to deter state officers from committing future violations. Months later, that court "departed from long-entrenched federal rules on standing" out of fealty to its deterrence-only approach. Writing for his court, Judge Traynor pointed out that "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified." Moreover, the court found that "such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction for others by the use of evidence illegally obtained against them."

³¹⁵ Goldstein v. United States, 316 U.S. 114, 127 n.4 (1942) (Murphy, J., dissenting).

³¹⁶ Kamisar, *supra* note 5, at 634–38, 663–64; Mertens & Wasserstrom, *supra* note 60, at 388.

³¹⁷ Kamisar, *supra* note 5, at 635 (citing and quoting Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 358 (1967).

³¹⁸ People v. Cahan, 282 P.2d 905 (Cal. 1955).

³¹⁹ Traynor, *supra* note 60, at 335.

³²⁰ People v. Martin, 290 P.2d 855, 857 (Cal. 1955), superseded by constitutional amendment, CAL. CONST. art. I, § 28(d), as recognized in People v. Johnson, 209 Cal. Rptr. 78, 80 (Ct. App. 1984)).

³²¹ *Id*.

Judge Traynor's fears were vindicated in *United States v. Payner*. ³²² According to findings of fact accepted by the Court in that case, the Internal Revenue Service (IRS) had been engaged in a fruitless, decades-long effort to prosecute taxpayers who were hiding income using offshore banks. ³²³ Unable to build meaningful cases using lawful methods, IRS agents plotted with two paid informants to steal a briefcase belonging to an employee of one of the suspect banks during a business trip to the United States in the hope that its contents would advance their investigation and provide evidence that could later be introduced at trial. One of the informants took the employee out on a date while the other broke into his room, stole his briefcase, worked with a locksmith recommended by the IRS to fashion a key for the briefcase, and then took the briefcase to IRS agents who opened it and photographed its contents. Among those papers were documents showing that Payner was a client of the bank and had deposited funds that were not reported to the IRS.

This operation was not the work of rogue agents. To the contrary, the agents involved sought and received prior approval from their supervisors to violate the Fourth Amendment rights of the banker in order to secure evidence against his clients.³²⁴ Based on its uncontested finding that the rule on standing was being affirmatively exploited by federal agents who indicated no intention to stop violating the Fourth Amendment rights of potentially innocent third parties, the district court granted Payner's motion to dismiss in order "to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."³²⁵

^{322 447} U.S. 727 (1980).

³²³ *Id.* at 729–31; *id.* at 739–43 (Marshall, J., dissenting).

³²⁴ Id. at 739.

³²⁵ United States v. Payner, 434 F. Supp. 113, 130–33 (N.D. Ohio 1977).

Given its deterrence concerns and frequent condemnation of flagrant Fourth Amendment violations, one would have expected the Supreme Court to affirm. It did not. It instead reversed, citing Justice White's language from *Alderman*³²⁶ for the general proposition that the standing requirement strikes a proper balance between costs to truth seeking and benefits to law enforcement.³²⁷ In addition to being a non sequitur, the Court here evidences spectacular naïveté.³²⁸

To start, the logic of *Payner* may be read as resting on a claim that punishing contumacious violators of the Fourth Amendment would serve no purpose precisely because they are contumacious violators and therefore are undeterrable. This constitutes a logical absurdity in that it contradicts the fundamental deterrence premise by encouraging contumacious violations of the Fourth Amendment. Alternatively, the Court may be read as claiming that enforcing the exclusionary rule only when the proponent has standing provides sufficient deterrence. As the facts in *Payner* demonstrate, however, that is simply not true. To the contrary, the general rule on standing licenses Fourth Amendment violations as a matter of policy, issuing the equivalent of a general warrant for government agents to search and seize at will with little or no investigative consequences in many cases. The Court might argue in response that this is a limited license and that the Fourth Amendment costs associated with its issuance are much less than the costs that would be inflicted to truth seeking if it was withdrawn. The Court does not make that argument, however, and probably cannot. The strategic incentives confronted by the officers in *Payner* are common to the point of ubiquity. Car searches provide a ready example.

³²⁶ Payner, 447 U.S. at 735 n.8.

³²⁷ See supra note 310 and accompanying text.

³²⁸ See Steiker, supra note 9, at 856.

³²⁹ See supra notes 28-32 and accompanying text.

As Justice White concluded in Rakas v. Illinois, a general and unyielding standing requirement "invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant." Justice White's concerns gain more force when one considers the fact that racial minorities and the poor in urban neighborhoods are routinely targeted for car stops. The very existence of these practices, and those documented in Payner, provides ample evidence that alternatives to the exclusionary rule, including § 1983 claims, are likewise insufficient.

As with the good faith exception and the cause requirement, deterrence considerations are insufficient by themselves to justify a general rule on standing.³³² Deterrence considerations instead counsel case-by-case analysis. In some cases the costs of extending the exclusionary rule to punish a law enforcement agency that routinely violates the Fourth Amendment in order to secure evidence against third parties may be quite low—if, say, the crime in question is a low-level drug possession offense—while producing dramatically greater respect for the Fourth Amendment. In other cases the "costs" of exclusion may be quite high, although the incremental diminishment of general

³³⁰ 439 U.S. 128, 168 (1978) (White. J., dissenting).

³³¹ Steiker, *supra* note 9, at 824, 838–44 ("[E]ven more deeply entrenched, is the widespread use by police of race as a proxy for criminality. From the very inception of modern preventative law enforcement, police officers have used social standing, as evidence by appearance, as an indicator of dangerousness."). Racial bias in car stops has been a key feature of both the war on drugs and more recently in the war on terror. *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering,* 98 GEO. L.J. 1005, 1035, 1047 (2010). *See also* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally, 71 U. CHI. L. REV. 1275 (2004). Racially motivated stops are so prevalent that they have bred mistrust of law enforcement in minority communities and are standard fodder for pop culture critique. <i>See, e.g.,* 2PAC, *Changes, on* GREATEST HITS (Interscope 1998) ("Instead of war on poverty/they got a war on drugs so the police can bother me"); *see also* THE FUGEES, *The Beast, on* THE SCORE (Ruffhouse 1996) ("You can't search me without probable cause/Or that proper ammunition they call reasonable suspicion/You planted seeds in my seat when I wasn't looking/Now you ask me for license and registration"). Recent data on racially motivated stops is available from the Institute of Race and Justice at Northeastern University. RACIAL PROFILING DATA COLLECTION CENTER, http://www.racialprofilinganalysis.neu.edu/ (last visited Feb. 3, 2012).

³³² Kamisar, supra note 5, at 636.

deterrence is quite low. Standing, as a function of reasonable expectations of privacy, just does not predict how this calculus will come out in any individual case.³³³

In contrast to a deterrence-only approach, the combination of principle and pragmatism endorsed by a hybrid approach to the exclusionary rule can provide firm grounds for the Court's general standing requirement while preserving flexibility to punish the kind of contumacious violations on display in cases like *Payner*. After *Rakas*, "standing" is really shorthand for whether the proponent of a motion to exclude has suffered a violation of his Fourth Amendment rights. In contrast with deterrence theorists, retributivists are committed to inflicting punishment only when the offender has perpetrated a culpable offense. The potential benefits of inflicting punishment are of no moment whatsoever. In its post-*Rakas* form, standing is essentially an element of the crime to be punished. Therefore, from a retributivist point of view, to punish an officer with exclusion in a trial where the defendant suffered no Fourth Amendment harm would often be akin to punishing a defendant who has just been acquitted for assaulting Jones because the court has some reason to believe that he may have assaulted Smith.

Retributivists do not endorse such an outcome as a general matter, and neither would a retributively grounded exclusionary rule. Of course a hard and fast standing rule might not be entirely attractive in light of *Payner*. Here, however, the flexibility afforded by a hybrid approach. For example, exceptions to the standing rule might be made in circumstances where the alleged Fourth Amendment violation could or must be fully litigated even in the absence of a defendant with direct standing. In keeping with the hybrid approach, exceptions might also be made in cases where failure to inflict exclusion would dramatically compromise deterrence goals. Thus, in cases

³³³ *Id.* at 634–38.

³³⁴ 439 U.S. at 140.

³³⁵ Gray, *supra* note 22, at 1656–72.

like *Payner*, where the institutionally sanctioned conduct of the offending officers put the moral standing of the government directly at issue and a failure to punish would have left an untenable gap in the wall of deterrence, both the principled and deterrence elements of the hybrid approach could justify punishing the officers for their contumacious conduct.

IV. Conclusion

At its genesis the exclusionary rule was justified by the Court as a constitutional remedy owed to victims of Fourth Amendment violations as a matter of right. The contemporary Court has adopted what William Heffernan calls the "severance principle," which holds that the exclusionary rule is a judicially created sanction rather than a constitutionally required right that is justified solely by its ability to deter government agents from violating the Fourth Amendment.³³⁶ This Article has adopted a middle course. It has accepted the Court's view that the exclusionary rule is not an individual right but is instead a form of punishment. The theory of punishment endorsed by the contemporary Court to justify the exclusionary rule is deterrence. By borrowing from H.L.A. Hart's critique of Jeremy Bentham, this Article has argued that core elements of the Court's Fourth Amendment exclusionary rule doctrine cannot be justified on deterrence grounds. In order to preserve these commitments, the Court must embrace a hybrid theory of the exclusionary rule that is committed to retributivist principles as well as utilitarian instrumentality. This recommendation is unlikely to satisfy fully veterans of the one-hundred-years-old battle over the exclusionary rule. For strident defenders of the exclusionary rule the approach advocated here may be unappealing because it defends perennial targets, including the good faith exception. The hybrid approach is also unlikely to satisfy exclusionary rule skeptics because it concludes that exclusion is a necessary adjunct to the Fourth Amendment in that it provides the most natural, fitting, and appropriate way to nullify or

³³⁶ Heffernan, supra note 67, at 825.

expiate constitutional violations committed during the course of criminal investigations.³³⁷ For those not already committed to a camp, this Article offers an approach that is coherent and grounded in familiar common law principles that should provide trial courts with clear guidance going forward.

³³⁷ The Court's recent decision in *United States v. Jones*, No. 10-1259, slip op. (Jan. 23, 2012), revitalizing a trespass conception of the Fourth Amendment does not appear to raise any additional questions. Exclusion was the remedy provided by the district court in that case and neither the majority nor the concurring opinions indicated that the remedy ought be different for Fourth Amendment violations described as trespass with the purpose of obtaining information as opposed to violations of subjectively manifested expectations of privacy that society is prepared to recognize as reasonable.