

ARTICLES

GOOD COPS, BAD COPS, AND THE EXCLUSIONARY RULE

Andrew M. Carter

ABSTRACT

For the modern Supreme Court, the Fourth Amendment exclusionary rule is all about bad cops. Per the Court, the rule works exclusively by deterring those officers, who by dint of malice, recklessness, or negligence are otherwise prone to Fourth Amendment intrusions. That sounds reasonable. However, the exclusionary rule's deterrent effect on bad cops is nothing more than hopeful conjecture; empirical support is lacking and economic models disappoint. This is not to say the exclusionary rule doesn't "work". The exclusionary rule works just fine in promoting constitutional policing in America; it just doesn't work the way the modern Court insists it must. What matters is not the exclusionary rule's impact on a small subset of bad cops. What matters is the rule's impact on all the good cops out there; i.e., that broad majority of police who go to work every day intending to respect Fourth Amendment boundaries. To stay on the right side of those boundaries, good cops need two tools: Fourth Amendment rules of engagement and training in how to apply those rules in the field. The exclusionary rule, working in perhaps unexpected ways, provides both.

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* Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. I thank Samantha Burke, Brendan Clark, and Aimee Harvey for valuable research assistance and Professors Susan Chesler, Kim Holst, and Judy Stinson for reviewing early drafts of this paper.

INTRODUCTION

The Fourth Amendment exclusionary rule has always been a bit preposterous. It's worth recalling that in its classic form, the rule requires exclusion of ill-gotten evidence as the remedy for *any* Fourth Amendment violation—no matter how serious the constitutional intrusion, how culpable the offending officer, or how essential the evidence to proving guilt. Sure, modern Supreme Court precedent limits the rule's application, especially with regard to searches conducted pursuant to a warrant.¹ But, at least on paper, there are still plenty of circumstances where the Fourth Amendment exclusionary rule contemplates a plainly guilty murderer escaping justice because of an officer's otherwise *de minimis* Fourth Amendment violation. No matter where you ultimately land on the exclusionary rule, that is a jolting notion.

So why the Fourth Amendment exclusionary rule?² To answer that question, you need to first understand that the rule is *not* constitutionally mandated. Scholars still argue about the rule's constitutional grounding,³ but as a matter of Supreme Court precedent, for the last fifty years the Fourth

1 See generally *infra* Part III (reviewing impact of the Supreme Court's expansive good faith exception to application of the exclusionary rule).

2 This Article focuses exclusively on the utility of the Fourth Amendment exclusionary rule, i.e., the rule that evidence obtained in violation of a defendant's Fourth Amendment rights should be excluded from the government's proof at a criminal trial. Exclusion is also an available remedy for oral statements obtained through violations of a defendant's Fifth or Sixth Amendment rights. However, violations of these provisions can actually render the statements obtained unreliable: e.g., a confession is more likely to be false if it is obtained in violation of the Fifth Amendment right against self-incrimination. See generally Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997). This presents a unique utilitarian justification for exclusion of unlawfully obtained oral statements. See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 859 (1995) (noting that reliability is the "best reason" underlying the rule of exclusion for violations of Fifth Amendment rights). In contrast, exclusion under the Fourth Amendment cannot be premised on reliability; tangible evidence is no more or less reliable depending on the constitutionality of the police evidence-gathering. Because of this distinction, the exclusionary rule's operation under the Fifth and Sixth Amendments is beyond the scope of this article.

3 See, e.g., Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 357 (2013) (reviewing debate and arguing that the rule is constitutionally required to give meaning to Fourth Amendment rights); see also Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 623 (1983) (arguing the exclusionary rule should be viewed as constitutionally required).

Amendment exclusionary rule has been nothing more than a public policy choice.⁴ The rule's legitimacy stems not from a reading of the Constitution but from a simple calculation that its public policy benefits outweigh its social costs.⁵

The costs of the exclusionary rule are real, if often overblown. Yes, on paper the rule contemplates allowing a guilty murderer to escape justice because of an officer's bumbling Fourth Amendment intrusion. But that actually never happens. In real life, courts are able to work around the rule where exclusion of evidence would undermine prosecution of a serious crime.⁶ (Indeed, if you can find a recent report of an obviously guilty violent felon walking free because of the exclusionary rule, let me know.) This is not to say the rule is meaningless. There are tens of thousands motions to exclude filed in American criminal courts every year.⁷ And while only a small percentage are actually granted,⁸ invariably where minor crimes are involved,⁹ year in and year out, the exclusionary rule undermines at least some American prosecutions.¹⁰

4 See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” (footnote omitted)); *Davis v. United States*, 564 U.S. 229, 236 (2011) (“Exclusion is ‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.” (citation omitted)); Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMPAR. L. 631, 631 (2010) (reviewing that exclusion of evidence obtained as a result of a violation of the constitution is no longer understood as a constitutional mandate).

5 See *infra* Part IV (reviewing modern Court's adoption of a cost-benefit analysis for application of the exclusion remedy).

6 See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003) (reviewing that judges “d[o] not like the idea of dangerous criminals being released into society” and therefore when facing a clearly guilty murderer or rapist making a Fourth Amendment claim, a judge will find “that the search, the seizure, or the invasion of privacy was reasonable”).

7 In 2016, for instance, in Texas alone, criminal courts resolved over 4,000 motions to suppress. See OFF. CT. ADMIN., TEX. JUD. BRANCH, *Annual Statistical Report for the Texas Judiciary* (2016), <https://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf> (analyzing statistics related to Texas judiciary's operations in 2016).

8 See Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 44 (1994) (reviewing startlingly low rate of successful motions to suppress).

9 See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, U. ILL. L. REV. 223, 234–35 (1987) (reviewing study confirming that “vast majority” of granted motions to exclude involve crimes where the defendant, if convicted, “would never have been given detention time”).

10 See, e.g., *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) (excluding evidence obtained when officer entered curtilage of home without a warrant during investigation of stolen motorcycle).

Balanced against these costs are the public policy benefits obtained by the exclusionary rule's operation. For the modern Supreme Court, the benefit of the rule is its deterrence effect: we accept the costs of the exclusionary rule because the rule deters those police officers who—by dint of malice, recklessness, or negligence—might otherwise intrude on a suspect's Fourth Amendment rights.¹¹ The threat that any ill-gotten evidence will be excluded from a suspect's trial, the reasoning goes, overcomes (deters) the bad cop's propensity to violate their fellow citizen's rights.

That sounds reasonable, especially if you believe there is a critical mass of bad cops out there who need deterring. But there is a problem with this “it deters bad cops” theory of the exclusionary rule's utility. It is little more than hopeful conjecture. After nearly a century of study,¹² there is still no reliable evidence that the threat of exclusion of evidence deters bad cops in the field from committing Fourth Amendment violations.¹³

It is not for lack of trying. Plenty of scholars have attempted to measure the exclusionary rule's impact on officer decision-making. But when you survey the literature, the best you can conclude is that maybe the threat of

11 See *Davis v. United States*, 564 U.S. 229, 246 (2011) (“[W]e have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.” (citations omitted)); see also *infra* Part III.

12 The notion that the threat of exclusion might deter bad cops in the field from Fourth Amendment transgressions dates at least to 1925. See Thomas E. Atkinson, *Admissibility of Evidence Obtained through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 24 (1925) (arguing that “[i]f the officers know that the evidence which they obtain through violation of the Amendment cannot be used, they will have no incentive to indulge in even merely technical violations”); see generally Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974) (providing a good review of the early development of the bad cop deterrence theory).

13 See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 595 (2011) (reviewing the literature and concluding “[w]hether measured in terms of arrests, convictions, or exclusions at trial, the empirical literature has failed to establish either the benefits or the costs of the exclusionary rule”); Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 765 (2008) (observing “a disturbing absence of any genuine empirical evidence pertaining to the Court's assumptions that underlie the modern exclusionary rule”).

losing evidence sometimes deters bad cops here and there.¹⁴ But probably not.¹⁵ And we will probably never know anyway.

The problem is that empiricism is nigh-impossible when it comes to measuring a rule's deterrent effects. Police officers, like folks generally, obey legal rules for all sorts of reasons—fear of a sanction, for sure, but also because of their good intentions, their professionalism, their training, and lots and lots of other things that inform a person's decision-making.¹⁶ Isolating the degree

14 The studies often cited in support of the exclusionary rule's deterrent impacts are generally based on interviews or questionnaires submitted to fairly small and geographically isolated samples of officers. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 81–82, 84–85 (1992) [hereinafter Orfield, *Deterrence, Perjury, and the Heater Factor*] (interviewing fourteen public defenders, twelve judges, eleven states attorneys and three other prosecutors and noting that in response to question, “Does the exclusionary rule deter unlawful police behavior[.]” every respondent save one answered in the affirmative); see also Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) [hereinafter Orfield, *Study of Chicago Narcotics Officers*] (interviewing twenty-six Chicago narcotics officers and concluding that the exclusionary rule has “significant deterrent effects”); Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study, and the Implications*, 45 N.C. L. REV. 119, 131–32 (1966) (reviewing ninety questionnaires completed by ninety North Carolina officers and concluding that exclusion has deterrent impacts); Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 284 (reviewing questionnaires completed by 113 respondents and concluding that exclusion reduces illegal searches). See generally L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If it's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 678–709 (1998) (providing an exhaustive critical review of these and other studies).

15 The more statistically reliable studies are generally skeptical that the exclusionary rule obtains appreciable deterrence of officers in the field. See Perrin et al., *supra* note 14, at 673 (reviewing questionnaire response by 450 officers in five police departments and concluding that rule has no deterrent impacts on officers in the field); see also Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970) (conducting meta-analysis of data from previous studies and concluding that “[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure”); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243, 245 (1973) (studying records of arrests, convictions, and motions filed in Chicago over two decades and concluding that rule has no deterrent impacts).

16 See Perrin, et al., *supra* note 14, at 711 (“The motivations of law enforcement officials defy direct observation, and that constitutes one of the most imposing barriers to the study of the rule.”); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 944 (1983) (observing that measuring the deterrence impact of the exclusionary rule “require[s] speculation about the motives of countless individuals, each acting upon his or her own schedule of preferences and desires, and about how these preferences may be

to which an officer in the field towed the constitutional line because of the exclusionary rule becomes a fool's errand.¹⁷

Of course, the lack of empirical evidence does not mean that the exclusionary rule does *not* have a deterrent impact on bad cops.¹⁸ But when empirical data is unattainable, support for a legal rule can usually be found in behavioral economics. And when it comes to predicting the exclusionary rule's purported deterrent effects, the economic models disappoint.¹⁹

At first blush, the notion that the threat of exclusion will deter a bad cop in the field is appealingly rational—if a painful consequence is likely to flow from an action, one will forebear from doing it.²⁰ But the economic model dictates that for deterrence to work, there needs to be some appreciable

influenced in the desired direction by one rule or another"); Oaks, *supra* note 15, at 715 ("Any attempt to determine whether or the extent to which the exclusionary rule affects the behavior of law enforcement personnel confronts an exceedingly complicated inquiry into human motivation within a complex social model . . .").

- 17 See Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368-69 (observing that "[i]n]o one is going to win the empirical debate over whether the exclusionary rule deters the police from committing a significant number of illegal searches and seizures"). This lack of empirical support for the bad cop deterrence theory has vexed generations of scholars. See, e.g., Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (observing that "[i]n]o one actually knows how effective the exclusionary rule is as a deterrent"); see also Oaks, *supra* note 15, at 709 (doubting that it is possible to quantify the effects of the exclusionary rule on policing); John Barker Waite, *Evidence—Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685 (1944) (noting that deterrence is "a logical enough theory" but not "one shred of evidence has been discovered" to support it).
- 18 But see Oaks, *supra* note 15, 675-78 (calling the rhetoric used to patch over the weak empirical basis for the exclusionary rule as "no more than fig-leaf phrases used to cover naked ignorance"); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 380-81 (1939) (expressing doubt that the exclusionary rule discourages illegal searches and observing that "wise judgments" about the rule "cannot be based on mere speculation and unproved assumptions").
- 19 See generally Jacobi, *supra* note 13, at 585-95 (conducting economic analysis of exclusionary rule and finding bare support for asserted deterrence impacts on officers in field); Slobogin, *supra* note 17, at 372-75 (concluding that both economic and behavioral theories suggest the exclusionary rule "is not a particularly effective way of motivating police to obey the Fourth Amendment").
- 20 See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 782 (2010) (reviewing that "[d]eterrence theory is a theory of crime that presumes that human beings are rational enough to consider the consequences of their actions and to be influenced by those consequences"); Aaron Chaffin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 5, 7-12 (2017) (reviewing Gary Becker's neo-classical model of criminal behavior that "envisions crime a gamble undertaken by a rational individual").

certainty of consequences.²¹ And while hard numbers are elusive, the chance that a bad cop's constitutional violation will lead to exclusion of evidence in a trial are, without question, vanishingly small.

There are just so many sharp turns between an officer's Fourth Amendment transgression and a successful motion to exclude.²² To begin, for a motion to be filed, there needs to be an actual arrest. But estimates suggest an astonishing number of Fourth Amendment intrusions do not actually end in an arrest. By way of example, one study found that of thirty-four obvious Fourth Amendment violations committed by officers in the field, only three resulted in an arrest.²³ This is the rule's classic underrepresentation problem: a bad cop who has no intention of pursuing an arrest would not be deterred in the least by the exclusionary rule.²⁴

21 See Paternoster, *supra* note 20, at 784 (reviewing modern studies confirming that certainty of punishment is key to deterrence); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (reviewing studies and concluding that certainty of punishment is key to deterrence); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 833 (2013) (reviewing that under economic model, the exclusionary rule only "discourages an unconstitutional search if the loss of the evidence discovered, multiplied by the likelihood of exclusion, exceeds the value of the evidence the police anticipate finding" (emphasis added)).

22 See generally Barnett, *supra* note 16, at 955-56 (reviewing series of unlikely events that must occur before an officer's Fourth Amendment transgression will result in actual exclusion of relevant evidence); Slobogin, *supra* note 17, at 375-80 (same).

23 See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 (2004) (reviewing results of observational study indicating that thirty-one out of thirty-four unconstitutional searches of citizens "would never reach the courts' eyes because suspects were neither cited nor taken into custody"); Slobogin, *supra* note 17, at 374-75 ("In a large number of cases involving questionable stops and searches, the police do not make an arrest, either because they never intended to do so or because they find nothing, so the exclusionary rule never has a chance to come into play." (footnotes omitted)); cf. Adam Gabbatt, *Stop and Frisk: Only 3% of 2.4m Stops Result in Conviction, Report Finds*, GUARDIAN (Nov. 14, 2013, 13:18 EST), <https://www.theguardian.com/world/2013/nov/14/stop-and-frisk-new-york-conviction-rate> (reviewing report establishing that of 2.3 million stop and frisk searches conducted in New York City from 2009-2012, only 150,000, or 3%, resulted in arrest).

24 Scholars observe that officers might conduct unconstitutional searches with no intent to arrest in order to obtain other objectives like removing weapons and narcotics from the community. See Jacobi, *supra* note 13, at 675 (observing that police "incentives are other than the exclusionary rule presumes: police variously value arrests, harassing minorities, being perceived as effective at controlling crime, and safeguarding the community—not just guaranteeing convictions"); Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970) (reviewing that individual officers are generally rewarded for their number of arrests, not their number of arrests that lead to successful prosecutions). See generally Donald Dripps, *The*

In the unlikely event that there is an arrest, for the exclusion “punishment” to remain in play, the defendant would then need to actually file a motion and, after that, a court would then need to actually rule upon it.²⁵ But over ninety-seven percent of federal cases and ninety-four percent of state cases are resolved by plea bargain,²⁶ most well before a motion to exclude is contemplated much less ruled upon.²⁷ And if a motion is filed and survives plea bargaining, standing in the way of success of even the most well-founded motion are huge obstacles including overburdened defense counsel,²⁸ a deep judicial bias in favor of police testimony,²⁹ and finally, the court’s own moral aversion to exclusion.³⁰

Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis, 85 CHI-KENT L. REV. 209, 223 (2010) (noting that police may find “considerable utility” in unlawful searches that do not lead to arrest).

- 25 See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. BAR FOUND. RSCH. J. 585, 585 (reviewing database of 7500 cases in nine-county study across three states and establishing that “[m]otions to suppress physical evidence are filed in fewer than 5% of the cases”). Importantly, even when there is an unlawful search leading to an arrest, the court’s standing rules might still preclude an actionable motion to exclude. See Perrin et al., *supra* note 14, at 675 (“The narrowing of the class of persons who have standing lessens the likelihood that the rule will be imposed, which further restricts its potential to deter.”).
- 26 See Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT’G REP. 326, 327 (2011) (discussing the steadily increasing rate of cases resolved by plea bargain).
- 27 See Perrin et al., *supra* note 14, at 750 (“Police know that most cases will end in a plea of guilty or some disposition other than a contested trial, and thus, are not deterred in many (if not most) instances.”). But see Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1086 (1982) (recognizing that the exclusionary rule may play a far greater role in plea-bargaining than in trials: “Although the guilty rarely go free because of the rule, they may receive reduced charges or sentences”).
- 28 See Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?smid=pl-share> (reviewing excessive caseloads handled by public defense attorneys across the nation).
- 29 Many scholars have observed that this judicial bias is, regrettably, exacerbated by police perjury. See Jacobi, *supra* note 13, at 607–09 (reviewing scholarship suggesting that real impact of exclusionary rule is that it encourages police perjury in order to ensure Court does not find a Fourth Amendment violation); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 272–77 (2017) (providing a staggering catalog of police misconduct on the stand).
- 30 See Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1580 (2015) (discussing study indicating that judges, through a process of “motivated cognition[,]” will unconsciously construe facts to avoid finding a Fourth Amendment violation).

In the end, of that tiny fraction of cases where there is an arrest, a motion is filed, and a court rules upon it, only about three percent of the motions are granted.³¹ Again, hard numbers are elusive, but even giving the most generous odds at each turn, they multiply to the point that the exclusionary rule's deterrent effect on bad cops becomes absurdly speculative. In the end, it is simply hard to take seriously the notion that a bad cop might forebear from a Fourth Amendment intrusion out of some concern that evidence might be excluded in a distant trial.³²

* * *

Does this mean the exclusionary rule doesn't work? No. The exclusionary rule surely does promote constitutional policing in America; it just doesn't work the way the Supreme Court says it does. What matters is not the rule's deterrence effect on a small set of bad cops prone to Fourth Amendment intrusions. What matters is the rule's impact on all the good cops—that broad majority of police officers who go to work every day with a sincere interest in respecting Fourth Amendment boundaries.³³

Consider that in the course of her police work, a good cop will naturally run into all sorts of Fourth Amendment questions: Do I need a warrant to attach a GPS device to a suspect's car? How do I go about establishing probable cause for a DUI arrest? The scenarios are endless really, and in each one, the good cop has to identify a line—on the one side, solid police

31 See Maclin, *supra* note 8, at 44 (recounting study indicating startlingly low rate of successful motions to suppress). It also bears mentioning that courts are notorious for only granting motions to exclude in those cases where a conviction is likely even without the tainted evidence. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 924 (1986) (observing that successful suppression motions do not guarantee acquittals and reviewing a study where “at least two thirds of the prosecutions involving successful suppression motions nevertheless yielded convictions”).

32 See Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 461 (2010) (conducting economic analysis and concluding that exclusionary rule “does not and cannot deter police misconduct” because “the expected cost to the police of their own misconduct . . . is nearly always zero” and “the probability that the evidence will be suppressed . . . even in cases of egregious police misconduct, is very close to zero”).

33 That one can measure the utility of the exclusionary rule by looking at either “bad cops” or “good cops” has been previously suggested in the literature. See, e.g., Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 852 (1994) (recognizing that “exclusionary rule litigation may be important not so much for the fear that it inspires in the ‘bad cop,’ but rather in the way that it creates an alternative vision of the ‘good cop’”); Albert Alschuler, *“Close Enough For Government Work”: The Exclusionary Rule after Leon*, 1984 SUP. CT. REV. 309, 354 (suggesting that exclusionary rule serves “those ‘good guy’ officers who seek to comply with constitutional norms and who do not fit the Supreme Court’s ‘gangbusters’ stereotype”).

work, and on the other, an unreasonable intrusion unto the civil liberties of a free people. It is a lot to ask really, especially in the heat of a criminal investigation. But, of course, all day every day in America, good cops manage the constitutional lines quite well. How is this so? It's the exclusionary rule, working in perhaps unexpected ways.

To do her job consonant with Fourth Amendment values, the first thing a good cop needs are rules of engagement: when do I have constitutional authority for a search or seizure and when do I not? The good cop needs a map, if you will, of where the constitutional boundaries lie. Where is the exclusionary rule's work here? In Part I, this Article examines the well-established mechanism by which motion practice under the rule fosters appellate court precedents that effectively establish the rules of engagement for good cops to follow. Indeed, just about everything that a good cop knows about constitutional policing is the product of exclusionary rule practice.

Of course, to be successful, good cops need more than rules of engagement. They also need training on how to apply those rules in the field. Where is the exclusionary rule's work here? In Part II, this Article examines the causal link between exclusionary rule practice and quality police training in Fourth Amendment values. The cause and effect is best explained by the doctrine of systemic deterrence—the notion that, while an individual cop might not be impacted by loss of evidence in a particular case, the aggregate of lost evidence would express at a systems level. Thus, police departments will train good cops how to stay on the right side of Fourth Amendment boundaries.

Scholars and jurists do not dispute the premises of this “it gives good cops the tools they need” theory of the exclusionary rule's utility. Indeed, even conservative members of the Supreme Court acknowledge that exclusionary rule practice fosters necessary constitutional boundary drawing and promotes quality police training.³⁴ Yet, when balancing the benefits of the exclusionary rule against its costs, the Supreme Court will only recognize a singular benefit—the dubious notion that it deters bad cops in the field from Fourth Amendment intrusions.³⁵ Somehow, apparently as a matter of law, any other public policy benefits of the exclusionary rule must be ignored.

34 See *supra* note 30 and accompanying text; *infra* notes 70–72 and accompanying text.

35 See *infra* notes 94–96.

In Part III, this Article tries to make some sense of this, explaining that the primacy of the bad cop deterrence theory was once necessary to anchor conservative efforts to defang the exclusionary rule with a broad “good faith” exception. However, with the Court signaling a future exclusionary rule regime that relies on a pure cost/benefits analysis in all contexts, the rule that the exclusionary rule must only be about deterring bad cops becomes a doctrinal relic.³⁶ Thus, this Article concludes in Part IV, the time may be ripe for a fair assessment of how the exclusionary rule fosters better policing in America.

I.

Since *Marbury v. Madison* in 1803, it has been understood that it is the Supreme Court that defines and gives value to the provisions of the Constitution.³⁷ For our purposes, this means that the judicial branch exercises a singular power to give meaning to the Fourth Amendment—which is all fine and dandy so long as there are some cases on the docket that ask the Court to interpret the Fourth Amendment. But prior to 1961, when the Court imposed the exclusionary rule on state court proceedings in *Mapp v. Ohio*,³⁸ the Court’s Fourth Amendment docket was rather bare. This matters. Good cops in 1955 knew that they needed a warrant to enter a home,³⁹ and that they didn’t need one to search a car,⁴⁰ but beyond that they were largely left to navigate Fourth Amendment boundaries on their own.⁴¹ The Court simply had too few cases asking it to draw boundaries that good cops could follow.⁴²

36 See *infra* Part IV.

37 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

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

39 See, e.g., *Amos v. United States*, 255 U.S. 313, 314 (1921) (declaring a non-consensual search of a home without a warrant violated the Fourth Amendment); *Agnello v. United States*, 269 U.S. 20, 34–35 (1925) (same).

40 See, e.g., *Carroll v. United States*, 267 U.S. 132, 162 (1925) (admitting evidence seized from a car, where the police had probable cause to believe the car contained contraband).

41 A search of the Westlaw database for U.S. Supreme Court cases discussing the “exclusionary rule” indicates that prior to *Mapp*, the rule prompted the court to draw Fourth Amendment boundaries roughly thirty times. In contrast, since *Mapp*, the rule has prompted the court to draw boundaries over 250 times.

42 The problem was rooted in the limited reach of exclusionary rule as it was first announced in *Weeks v. United States*, 232 U.S. 383 (1914). The *Weeks* rule was a Fourth Amendment decision that only governed federal courts, and federal criminal jurisdiction extended to only a small fraction of crimes in America. Thus, while there was a small rush of Fourth Amendment cases that reached the

Consequently, good cops in the field knew very little about what was—and was not—an unreasonable search proscribed by the Fourth Amendment.⁴³

Everything changed after *Mapp*. Because state courts prosecute the vast majority of crimes in America,⁴⁴ *Mapp* ignited an explosion of exclusionary rule practice. In turn, the courts suddenly faced broad new classes of cases squarely presenting Fourth Amendment questions for resolution—cases that allowed the courts to create in short time a deep body of law to guide good cops in the field.

Here is a way to look at it: There is a “Legal Training Handbook” updated each year by the Chief Counsel’s Office of the Federal Law Enforcement Training Center.⁴⁵ The Handbook serves both as a foundational text for training new federal law enforcement officers and as a reference guide for

Supreme Court during Prohibition, when Prohibition was repealed in 1933, “[t]he flow of search cases to the federal Supreme Court was reduced to a trickle[.]” Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 971 (2010). It is true that a number of state courts had adopted some version of the exclusionary rule prior to *Mapp*. See Wesley M. Oliver, *Prohibition’s Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 511 (2018) (reviewing that twenty-two states had adopted a full-fledged exclusionary rule by the time of *Mapp*). But the state exclusionary rule cases only prompted state courts to draw state constitutional boundaries; these cases were silent as to the Fourth Amendment. See DAVIES, *supra*, at 970 (discussing state exclusionary rule cases).

43 Writing in 1962, Justice Traynor of the California Supreme Court recalled that the Supreme Court’s refusal to impose the exclusionary rule on state courts during the 1950s “frustrated the possibilities of litigation in the Supreme Court that could have given more than spectral illumination of the right. In consequence no case law developed at the highest level to yield guiding standards for determining what searches and seizures would be subject to condemnation under the fourteenth amendment.” Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327. The legislative branch could have conceivably filled the rule-making void, but before *Mapp*, “the several legislatures have given less than adequate attention to the need for clear-cut rules on police conduct.” Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 569 (1965); see also Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 45 (2001) (“American legislatures consistently have failed to address defects in the criminal process, even when they rise to crisis-level proportions.”).

44 See Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 5 (2012) (reviewing that the “vast majority” of serious criminal prosecutions are handled in state courts and that “criminal justice remains the predominant responsibility of states and localities, rather than the federal criminal system”); see also *Comparing Federal & State Courts*, U.S. COURTS (last visited March 18, 2021), available at <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (noting that state courts hear most criminal cases).

45 OFF. CHIEF COUNS., FED. L. ENFORCEMENT TRAINING CTR., U.S. DEP’T HOMELAND SEC., LEGAL TRAINING HANDBOOK (2019) [hereinafter LEGAL TRAINING HANDBOOK].

officers in the field. The Handbook is over 500 pages long. There is, *inter alia*, a chapter dedicated to investigating internet crimes, one dedicated to how to conduct an interrogation, and one dedicated to offering professional courtroom testimony. But the Legal Training Handbook's longest chapter by far—120 pages in all—addresses the Fourth Amendment.⁴⁶

Among many, many other rules, the Fourth Amendment chapter offers the rules for which searches require warrants and which do not, the rules for making a lawful arrest and conducting searches incident thereto, the rules for building probable cause in the field, the rules underlying the plain view doctrine, the rules for submitting a valid search warrant application, and the rules for searching impounded property.⁴⁷ What matters for our purposes is that each of these rules—each of those boundaries drawn to guide good cops in the field—is a product of exclusionary rule practice.

Say, for instance, a good cop is investigating a suspected drug manufacturing operation in a private home. She knows that there may be material evidence in the home's garbage, which raises the question—do you need a warrant to search someone's trash? Those rules are on page 353 of the Legal Training Handbook.⁴⁸ Here is what a good cop needs to know in order to conduct a constitutionally-sound search: While you clearly need a warrant to search a suspect's garbage in a home or the home's curtilage, you do not need a warrant to search trash left for pick-up. Where did that latter rule come from? It was announced by the Supreme Court in 1988 in *California v. Greenwood*.⁴⁹ And what prompted the Court to announce that new rule for good cops to follow? Billy Greenwood, after he was charged with a narcotics offense, filed a motion in the Orange County, California Superior Court to exclude evidence police discovered after officers searched his garbage without first seeking a warrant.⁵⁰ Since *Mapp*, that process modeled in *Greenwood*—a motion to exclude filed in a trial court leading to a new Fourth Amendment boundary articulated by an appellate court—has occurred over

46 See *id.* at 337–457 (addressing Fourth Amendment limitations, as applied to federal agents).

47 See generally *id.* at 337–341 (guiding federal agents on proper Fourth Amendment practices).

48 *Id.* at 353.

49 See *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (explaining that “having deposited their garbage ‘in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,’ respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.”) (citation omitted).

50 *Id.* at 38.

and over again. Until today good cops have at their disposal a Fourth Amendment playbook that measures at 120 pages.⁵¹

This direct line between exclusionary rule practice and judicial articulation of Fourth Amendment rules has long been recognized by scholars and jurists. In his otherwise critical study of the rule, Dallin Oaks acknowledged that the exclusionary rule provides a “practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights.”⁵² And writing for the Court in *Davis v. United States*, a 2011 decision, Justice Alito recognized that the Court’s exclusionary rule decisions were intended to guide good cops in the field.⁵³ Justice Alito explained that “well-trained officers will and should use” the Court’s Fourth Amendment precedents “to fulfill their crime-detection and public safety responsibilities.”⁵⁴ He went on to explain that “[r]esponsible law enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent and will conform their conduct to these rules.”⁵⁵

This boundary-drawing function of the exclusionary rule does not sunset. As technology evolves and new investigatory tactics become available, good cops will always have new questions about what is, and what is not, a Fourth Amendment intrusion. In 1967, the question was whether the Fourth Amendment required police to get a warrant before tapping a phone.⁵⁶ In 2001, the question was about capturing a thermal image of a home.⁵⁷ And last year, the question was about tracking cell phone location data.⁵⁸ All of these questions, naturally, were brought to the Supreme Court by way of a motion

51 See generally LEGAL TRAINING HANDBOOK, *supra* note 45.

52 Oaks, *supra* note 15, at 756; see *id.* (“The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees.”); Goodpaster, *supra* note 27, at 1072 (“The first implicit function of the rule is to express the judiciary’s constitutional regulatory power to review and establish standards of lawful police behavior.”); LaFave, *supra* note 43, at 580 (“One of the principal virtues of the exclusionary rule is that it assures a great deal of judicial attention to questions concerning police practices.” (internal quotation marks omitted)).

53 *Davis v. United States*, 564 U.S. 229, 241 (2011).

54 *Id.*

55 *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006))

56 See *Katz v. United States*, 389 U.S. 347, 349–50 (1967) (considering whether police require a warrant to tap a phone in a phone booth).

57 See *Kyllo v. United States*, 533 U.S. 27, 29 (2001) (considering whether police require a warrant to aim a thermal-imaging device at a home).

58 See *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018) (considering whether obtaining cell phone tracking information is a Fourth Amendment search).

to exclude; by resolving these cases, the Court gave officers the guidance they needed to respect constitutional boundaries. (The Fourth Amendment requires a warrant in all the above).⁵⁹

This presents one of the biggest challenges for those who seek full abrogation of the exclusionary rule: In the absence of the exclusionary rule, in the face of new police technologies or changing social conditions⁶⁰, how exactly will the Court find opportunity to draw (or redraw) Fourth Amendment boundaries? Those seeking abolition of the rule will point to civil rights litigation as an available source of constitutional boundary drawing.⁶¹ 42 U.S.C. § 1983 does provide a private cause of action for a citizen whose Fourth Amendment rights have been offended. And by resolving these civil cases, appellate courts could conceivably announce new Fourth Amendment rules for good cops to follow.

However, historically, § 1983 cases have not proven particularly effective at framing Fourth Amendment issues for appellate court resolution.⁶² And if

59 A fair critique is that not every motion to exclude presents a novel line-drawing opportunity for the Court. Perhaps, then, we should make the exclusionary rule only operative for cases at the borders of Fourth Amendment doctrine. The devil is in the details, of course. You could argue that any case involving a warrantless search sits at the edge of Fourth Amendment doctrine inasmuch as each case would turn on its unique facts and circumstances.

60 Exclusionary rule practice does more than give appellate courts the cases they need to resolve the Fourth Amendment questions prompted by new technologies. Exclusionary rule practice also gives appellate courts the power to recalibrate, at a systemic level, the Fourth Amendment's reasonableness standard in response to changing social conditions. The Warren Court, fair to say, used the post-*Mapp* exclusionary rule cases to rebalance the reasonableness standard in favor of individual rights and away from asserted crime-fighting interests. See Davies, *supra* note 42, at 983 (“[T]he impetus for incorporation in *Mapp* surely traces back directly to the horrors of lynch justice in the *Scottsboro Case*, *Brown v. Mississippi*, and far too many others.” (footnotes omitted)). By the same token, it was the exclusionary rule that gave the Burger and Rehnquist courts the opportunity to recalibrate that balance away from individual rights and in favor of asserted crime-fighting goals. See *id.* at 994 (reviewing that the so-called “war on drugs” gave the Burger Court “a substantial and continuing flow of potential cases” to work with “because prosecutions for possessory offenses almost always involved a search and seizure”).

61 See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (suggesting that “many forms of police misconduct are deterred by civil-rights suits”); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 671, 674 (2011) (noting the Supreme Court’s tendency “to consider the availability of constitutional tort remedies as a justification for denying the remedy of suppression”).

62 The Legal Training Handbook cites some sixty different Supreme Court cases that articulate Fourth Amendment rules to guide good cops in the field. Section 1983 practice prompted less than a quarter of these boundary-drawing cases. And critically, the Section 1983 cases that are cited are rather old; they predate the Court’s modern qualified immunity doctrine. See generally LEGAL TRAINING HANDBOOK, *supra* note 45, at 353–473.

§ 1983 litigation ever had the capacity to foster constitutional boundary drawing, it doesn't any longer.⁶³ The modern Supreme Court's expansive qualified immunity doctrine has seen to that. First, it has made recovery of money damages near impossible in § 1983 claims, giving plaintiffs little incentive to pursue a claim before the courts.⁶⁴ And even if a plaintiff gives it a go, the court has endorsed a decision-making procedure expressly designed to *avoid* resolving novel Fourth Amendment questions.⁶⁵

II.

Having a rulebook is great. But a good cop interested in constitutional policing also needs training in how to apply those rules in the field. Keep in mind that we do not expect good cops to observe a Fourth Amendment boundary on the horizon and stay as far away as possible. Rather, we expect good cops to pursue crimes up to—but not beyond—the constitutional boundary. And that requires training. Which brings us to the second plank of the good cop theory of the exclusionary rule: the widely recognized link between exclusionary rule practice and quality police training in Fourth Amendment rules of engagement.

63 See Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI-KENT L. REV. 191, 191 (2010) (tracking the limits of the modern Section 1983 cases and predicting “the substantial elimination of Fourth Amendment litigation in the Roberts Court.”); Perrin et al, *supra* note 14, at 737–38 (noting that while colorable, “civil suits for tortious conduct based on illegal searches and seizures are recognized as practically ineffective and remedially inadequate”); Maclin, *supra* note 8, at 61–62 (concluding that § 1983 litigation does not prevent Fourth Amendment violations).

64 In a 2018 article, William Baude observed that in the past thirty-five years, the Supreme Court has heard thirty cases asking whether qualified immunity should protect a government defendant from paying damages for a constitutional intrusion; in all but two of those case, the Court immunized the defendant from paying damages. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018).

65 See *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (endorsing process whereby a trial court can dismiss § 1983 case based on qualified immunity without ever considering whether there was a constitutional violation in the first place); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 132–36 (discussing diminished impact of § 1983 litigation on development of Fourth Amendment boundaries). Qualified immunity does not preempt § 1983 claims for injunctions or other equitable relief. But these claims too are routinely dismissed long before courts might have occasion to draw a constitutional boundary. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a § 1983 plaintiff could not obtain “equitable standing” unless plaintiff could demonstrate substantial certainty of *future* misconduct directed at plaintiff).

No one seems to dispute that exclusionary rule practice catalyzes quality policing training in America.⁶⁶ The evidence is compelling. The Court nationalized the exclusionary rule in 1961.⁶⁷ In the years before that, roughly half of state courts had no exclusionary rule.⁶⁸ Looking at the before and after data, Wayne LaFave, writing in 1965, reported that “[i]t is clear that the exclusionary rule has served as a stimulus to police training on the legal requirements of search and arrest [S]ince *Mapp* the FBI has greatly intensified its efforts in training state and local officers on the requirements of the Fourth Amendment.”⁶⁹ Conservative members of the Supreme Court recognized this link. In the 1984 *Leon* opinion, Justice White observed that the exclusionary rule provides an “impetus” to police training programs that both “make officers aware of the limits imposed by the [F]ourth [A]mendment and emphasize the need to operate within those limits.”⁷⁰ And in his 2006 opinion in *Hudson*, Justice Scalia acknowledged that in the fifty years since *Mapp*, there has been “increasing professionalism of police forces”⁷¹ and “wide-ranging reforms in the education, training, and supervision of police officers.”⁷²

66 William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 448 (1997) (noting that since *Mapp*, “experienced officers are the first to say that the quality of police training and the degree to which police obey the law have risen dramatically over the past three decades or so”); see also Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 559 (1990) (reviewing connection between exclusionary rule practice and improved police training); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977) (“The key to the exclusionary rule’s effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs . . .”).

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

68 Oliver, *supra* note 42, at 511.

69 LaFave, *supra* note 43, at 594; see also Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y, 119, 123–26 (2003) (reviewing evidence establishing that *Mapp* immediately spurred police training in Fourth Amendment rules); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1400 (1983) (“[T]he exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the [F]ourth [A]mendment[.]”).

70 *United States v. Leon*, 468 U.S. 897, 919 n.20 (quoting Israel, *supra* note 66, at 1412–13); cf. *id.* at 918 (noting that the exclusionary rule’s deterrent impact depends on “alter[ing] the behavior of individual law enforcement officers or the policies of their departments” (emphasis added)).

71 *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

72 *Id.* at 600 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 51 (1993)). Justice Scalia’s broader point may have been that

The challenge is discerning the mechanism at play—how exactly does exclusionary rule practice improve police training? The best theory is that in a form of institutional or bureaucratic deterrence, police departments are “deterred” from letting officer training lapse for fear of successful motions to exclude.⁷³ This is what William Mertens and Silas Wasserstrom in a 1992 article called “systemic deterrence.”⁷⁴ The notion here is that while an individual cop may not be impacted by loss of evidence in a particular case, the aggregate of lost evidence would refract at a systemic level. Thus, to avoid giving a defendant fodder for a successful motion to exclude, police departments will train good cops how to abide by Fourth Amendment boundaries.⁷⁵

We are, of course, dealing with deterrence again, and beyond the pre- vs. post-*Mapp* comparison, a search for empirical proof of the exclusionary rule’s

because police training had improved so much since *Mapp*, exclusionary rule practice was no longer necessary to deter bad cops. *Id.* Justice Ginsberg effectively rebutted this point in her dissent in *Herring v. United States*: “professionalism is a sign of the exclusionary rule’s efficacy—not of its superfluity.” 555 U.S. 135, 156 n.6 (2009) (Ginsberg, J. dissenting).

73 To be sure, there is a less cynical explanation: perhaps police departments train their officers to respect Fourth Amendment boundaries simply because respecting Fourth Amendment boundaries is the right thing to do. Even so, the exclusionary rule is probably still at work here. By announcing that Fourth Amendment values are so sacred that we are prepared to let a guilty person go free, the court expresses “society’s authoritative moral condemnation” of Fourth Amendment intrusions; this condemnation, in turn, informs the value system of police leadership. Kinports, *supra* note 21, at 834–35 (citation omitted). This is what you might call the “moral or educative influence” of the exclusionary rule: “[a]s a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the [F]ourth [A]mendment credible.” Oaks, *supra* note 15, at 711; *see also* Johannes Andenaes, *The Moral or Educative Influence of Criminal Law, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 50, 50–59 (Juan Louin Tapp & Felice J. Levine, eds., 1977); Steven Cann & Bob Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 *HOW. L.J.* 299, 317 (observing that the exclusionary rule works as “a communicative device, teaching and reinforcing democratic values”); Gould & Mastroski, *supra* note 23, at 321 (“[T]o the extent police officers respect and accept the constitutional principles of search and seizure, they will be more inclined to follow those rules.”).

74 *See generally* 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 (1981) (using the term “systemic deterrence” to describe the exclusionary rule’s “effect on individual police officers through a police department’s institutional compliance with judicially articulated [F]ourth [A]mendment standards”).

75 *Id.* at 399 (observing that to protect prosecutions “professional police forces can be expected to encourage [F]ourth [A]mendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests”); *see also* *United States v. Leon*, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) (“[T]he chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”).

enduring “systemic deterrence” bears no fruit. But here, the economic models do predict that exclusionary rule practice will catalyze quality police training.⁷⁶ One can easily discern an efficient economic model: In 2012, in *United States v. Jones*, the Supreme Court ruled that police must obtain a warrant before attaching a GPS device to a private vehicle.⁷⁷ Now imagine a case after *Jones* where the prosecution seeks to use evidence from a GPS device that was attached to a vehicle *without first obtaining a warrant*. Even under today’s constrained exclusionary rule, it would be hard for a court to find a way around exclusion.⁷⁸ How do law enforcement institutions avoid that outcome? They make sure they teach officers the rule announced in *Jones*. It comes as no surprise, then, what you find on pages 342–43 of the Federal Law Enforcement Training Manual: Instruction that attaching a GPS tracking device to a private vehicle requires a warrant.⁷⁹

III.

Unlike the bad cop deterrence theory, both planks of the good cop theory of the exclusionary rule enjoy broad-spectrum support. Indeed, even conservative members of the Supreme Court acknowledge that the exclusionary rule fosters necessary Fourth Amendment line-drawing and that it catalyzes better police training. And yet, before the Court, when it comes to assessing the public policy benefits of the exclusionary rule, the good cop theory is apparently off-the-table. For over forty years now, the Supreme Court has insisted that that the exclusionary rule’s public policy benefits are to

76 See Slobogin, *supra* note 17, at 395 (observing that economic analysis “suggests that organizational liability should work relatively well in connection with police departments”).

77 *United States v. Jones*, 565 U.S. 400, 404 (2012).

78 For the time being, at least, evidence collected as a direct consequence of an unlawful warrantless search is to be automatically excluded. See, e.g., *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

79 LEGAL TRAINING HANDBOOK, *supra* note 45, at 342–43. Granted, the Handbook is an easy model. For a good cop in the field, the questions are often more vexing, turning on nuanced questions of whether there is “reasonable suspicion” or “probable cause” for a search without a warrant. How does the exclusionary rule encourage police training on how to resolve these more nebulous questions? Consider a new officer testifying, in a close case, that she had probable cause for an arrest. Now imagine that on cross-examination, the new officer testifies she had no training whatsoever on how to assess probable cause for an arrest. This lack of training, fair to say, would raise the judicial eyebrows and weigh heavily in favor of exclusion. To avoid this, what do police departments do? They train officers on how to constitutionally assess probable cause for an arrest.

be measured singularly and exclusively by its utility in deterring bad cops in the field.⁸⁰ What is going on here?

The rule that exclusion of evidence is the proper response to a Fourth Amendment violation dates to a 1914 case, *Weeks v. United States*.⁸¹ There, the Supreme Court announced that evidence gathered in violation of the Fourth Amendment could not be considered at trial because to consider such evidence would make the judiciary complicit in the police wrongdoing.⁸² The Court could not stomach “to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people[.]”⁸³ Notably, the *Weeks*’ Court did not mention anything about the utility of the rule in promoting better policing. Indeed, for the first fifty years of its existence, the consensus was that the exclusionary rule was designed to protect the integrity of the judiciary.⁸⁴

The Supreme Court first discussed the notion that the exclusionary rule might have some social utility in a 1960 decision, *Elkins v. United States*.⁸⁵ It was in *Elkins* that the Supreme Court first suggested that one purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁸⁶ The Court in *Elkins* did not suggest that deterrence was the singular value served by the exclusion of evidence; the Court also noted “the imperative of judicial integrity.”⁸⁷ However, in a series of cases in the 1970s, a conservative

80 See *Davis v. United States*, 564 U.S. 229, 246 (2011) (“[W]e have said time and again that the sole purpose of the exclusionary rule is to deter misconduct by law enforcement.”).

81 See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that withholding of documents taken from the accused’s house without a warrant constituted a violation of the Fourth Amendment). Scholars will often trace the modern exclusionary rule to *Boyd v. United States*, 116 U.S. 616 (1886). However, *Boyd* was about invoices turned over to the police. *Id.* at 618. At bottom, *Boyd* was a case about the right against self-incrimination under the Fifth Amendment—in the sense that using someone’s invoice against them is akin to compelling them to testify against themselves. See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 729 (1999) (“*Boyd* opened the way for later court decisions to create modern [Fourth Amendment exclusionary rule] doctrine, but it did not actually do so itself.”).

82 *Weeks*, 232 U.S. at 393–94.

83 *Id.* at 394.

84 See Kamisar, *supra* note 3, at 565 n.1 (noting the exclusionary rule “did originally and for much of its life” rest on principle rather than utility (emphasis omitted)).

85 364 U.S. 206 (1960).

86 *Id.* at 217.

87 *Id.* at 222; see also *Lee v. Florida*, 392 U.S. 378, 385 (1968) (“[T]he decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the ‘imperative of judicial integrity.’” (quoting *Elkins*, 364 U.S. at 222)).

bloc of the Supreme Court began to insist that deterrence of bad cops in the field was actually the only purpose of the exclusionary rule.⁸⁸

What were the conservatives up to? Well, one year after *Elkins*, the Court announced its opinion in *Mapp v. Ohio*.⁸⁹ Prior to *Mapp*, the Fourth Amendment exclusionary rule was a rather sleepy doctrine; it only applied to federal prosecutions, and most federal prosecutions involved tax, liquor, and gambling offenses.⁹⁰ Exclusion of relevant evidence in these cases simply didn't foment much public outrage.⁹¹ But *Mapp* nationalized the rule, requiring that evidence obtained in violation of the Fourth Amendment must also be excluded in state court proceedings.⁹² Because state courts prosecute the vast majority of crimes in America, including nearly all violent crimes, exclusion of evidence suddenly did foment outrage—both from the public⁹³ and from conservative jurists and scholars.⁹⁴

88 See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”); *United States v. Janis*, 428 U.S. 433, 446 (1976) (explaining that the Court “has established that the prime purpose of the rule, if not the sole one, is to deter future unlawful police conduct.” (citations omitted) (internal quotation marks omitted)).

89 367 U.S. 643 (1961).

90 See *Davies*, *supra* note 42, at 991 (“Prior to the incorporation doctrine, federal constitutional standards had largely applied either to the sorts of white-collar crimes that did not overly scare or incite the public, or to the alcohol or drug cases that fell within the limited reach of federal court jurisdiction.”).

91 See *id.* at 991–92 (stating that public sentiment at the time did not favor widely extending Fourth Amendment protections to violent crimes); *Oliver*, *supra* note 42, at 474–75 (suggesting that even modern critics of the exclusionary rule would have found “defensible” its application to curb Prohibition excesses).

92 *Mapp*, 367 U.S. at 655–56.

93 See *Davies*, *supra* note 42, at 991 (recounting that after *Mapp*, “the search cases that reached the Court were no longer confined to booze, drugs, and white-collar crimes; now they sometimes also included burglary, armed robbery, rape, and murder[,] [a]nd the extension of constitutional protections to persons accused of violent crimes did incite and scare the public”); *Goodpaster*, *supra* note 27, at 1065, 1067 (writing in 1982 that “[p]ublic fear of crime is intense” and “[i]n this atmosphere of public fear, desperation, and anger, the exclusionary rule appears a sinister ally of criminal forces”).

94 As a judge on the D.C. Circuit and later as Chief Justice, Warren Burger practically went on a lecture tour railing against the exclusionary rule. *Laurin*, *supra* note 61, at 690 (“Burger came to the Court in 1969 with a well-known record of hostility toward the exclusionary rule, and over the course of his tenure pursued an agenda directed toward its curtailment.” (footnote omitted)); see also Donald A. Dripps, *The “New” Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence,”* 37 *FORDHAM URB. L.J.* 743, 749 (2010) (“Reflecting the electoral sentiment of the 1970s, new justices showed more concern for law enforcement . . . [A]nd embraced a purely

In the years following *Mapp*, there were certainly calls for complete abrogation of exclusionary rule.⁹⁵ But by the late 1970s, a pragmatic conservative opposition had coalesced around the goal of establishing a “good faith” exception to the rule.⁹⁶ The idea was that where an officer in good faith believed they commanded the requisite probable cause and properly obtained a warrant before conducting a search, if the search was later found infirm, exclusion of evidence would serve no utilitarian purpose. The officer’s good faith meant there was no “bad cop” to deter, and therefore, the reasoning goes, no reason for exclusion.⁹⁷

There is some good sense here. Good faith surely does diminish the deterrence values of the exclusionary rule, whatever they be. But an officer’s good faith doesn’t diminish other benefits obtained by the exclusionary rule—like fostering constitutional line-drawing and catalyzing well trained police forces. But the conservatives were looking for a hard rule against the exclusion remedy. And the good faith exception could only work to wholly nullify the exclusionary rule’s operation if the entire operation was premised on deterring bad cops in the field.⁹⁸ In *United States v. Calandra*, a 1974 decision, a conservative majority laid the groundwork, establishing that the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal

deterrent view of the exclusionary rule, expressive of a new Supreme Court majority more sympathetic to law enforcement than the last.”)

95 See, e.g., *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring) (arguing in favor of “overruling this judicially contrived doctrine”).

96 See Israel, *supra* note 66, at 1408–09 (reviewing Justice White’s efforts to build a majority in favor of adopting good faith exception as a moderate curtailment of exclusionary rule that fell short of outright abrogation); Davies, *supra* note 42, at 1006 (reviewing momentum for good faith exception after the Supreme Court stopped short of abolishing the exclusionary rule in its 1976 opinions).

97 See generally Dripps, *supra* note 31, at 909 (reviewing basic premise of good faith exception: “When the police believe their actions to be legal, the threat of exclusion of illegally obtained evidence is not likely to affect their behavior”).

98 It is perhaps best to understand the elevation of the bad cop deterrence theory as a sort of “creation story” composed by conservative jurists seeking doctrinal coherence for their efforts to weaken the exclusionary rule. See Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 394 (2010) (assessing Chief Justice Roberts’ majority opinion and Justice Ginsburg’s dissenting opinion in *Herring*: “Their opinions reflect two distinct ‘creation stories’ about the exclusionary rule, stories that not only describe the history of the rule very differently, but also have completely different articulations of the rule’s purposes and its place in the constitutional structure”).

constitutional right of the party aggrieved.”⁹⁹ Ten years later, in *United States v. Leon*, the other shoe dropped, and the Court recognized the good faith exception to the exclusionary rule.¹⁰⁰

Today, deterrence of bad cops in the field is not just the primary justification for the rule, it is the only justification.¹⁰¹ Here is Justice Roberts writing for the Court in *Davis v. United States*, a 2011 decision: “[W]e have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.”¹⁰² What to make, then, of the Court’s earlier recognition that excluding illegally obtained evidence from trial might serve other values? In his 2006 opinion in *Hudson*, Justice Scalia explained that away as his predecessors’ sloppiness.¹⁰³

IV.

We now have two important premises before us: First, the exclusionary rule exists only on the ground that it deters bad cops in the field from intruding on Fourth Amendment rights. Second, the exclusionary rule, as best we can tell, does not deter bad cops in the field. You can probably see where this is going.

In a series of cases over the past fifteen years, the Supreme Court has aggressively extended the reach of the good faith exception, emphasizing at each turn the exclusionary rule’s fanciful deterrent impacts. For example, in the Court’s 2009 decision in *Herring*, Chief Justice Roberts held that the

99 414 U.S. 338, 348 (1974); *see also* *United States v. Janis*, 428 U.S. 433, 446 (1976) (“This Court . . . has established that the ‘prime purpose’ of the rule, if not the sole one, ‘is to deter future unlawful police conduct.’” (quoting *Calandra*, 414 U.S. at 347)).

100 468 U.S. 897, 913 (1984).

101 *See* 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, 53 (2010) (“Over the course of the last fifty years . . . deterrence has occupied a growing centrality to the point that it is now considered the only benefit and purpose of the exclusionary rule.”); Clancy, *supra* note 3, at 357 (“Deterrence is now the rule’s sole purpose, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.”).

102 564 U.S. 229, 246 (2011).

103 *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“We did not always speak so guardedly. Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule.”). Today, deterrence as the singular measure of the rule’s efficacy is so deep-seated that more liberal members don’t even challenge the notion. *See Davis*, 564 U.S. at 250 (Sotomayor, J., concurring) (“Under our precedents, the primary purpose of the exclusionary rule is to deter future Fourth Amendment violations. Accordingly, we have held, application of the exclusionary rule is unwarranted when it does not result in appreciable deterrence.” (citations omitted) (internal quotation marks omitted)).

“marginal deterrence” of the exclusionary rule could not justify exclusion of evidence in a case where a Fourth Amendment violation stemmed from a good faith police recordkeeping error.¹⁰⁴ And in the Court’s 2011 decision in *Davis*, Justice Alito found exclusion inappropriate when police conduct a search in good faith reliance on precedent that is later overturned.¹⁰⁵ Justice Alito skeptically observed that “all that exclusion would deter in this case is conscientious police work.”¹⁰⁶

In one sense, these cases can be read as just another land grab in the modern Court’s long guerilla war against the exclusionary rule’s scope. But it is hard to ignore the Court’s signaling of a more fundamental change to the exclusionary rule regime. Any number of scholars have observed that the Court appears poised to forsake once-and-for-all the “classic” exclusionary rule, which, at least on paper, still contemplates exclusion as the automatic response in a broad swath of cases involving unlawful warrantless searches.¹⁰⁷ The new rule will be thus: In all cases, a trial court may only exclude ill-gotten evidence where the costs of exclusion are outweighed by the benefits obtained.¹⁰⁸ The foundation for the balancing regime was laid in 2006’s

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

105 *See Davis*, 564 U.S. at 238 (“[W]hen the police act with an objectively reasonable good-faith belief that their conduct is lawful, . . . the deterrence rationale loses much of its force, and exclusion cannot pay its way.” (citations omitted) (internal quotation marks omitted)).

106 *Id.* at 241; *see also* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (taking expansive view of attenuation theory to insulate unconstitutional investigatory stop from application of exclusionary rule).

107 *See* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1185 (2012) (discussing the evolution of the exclusionary rule from a formal legal remedy to a more discretionary judicial instrument); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 390–91 (2011) (highlighting the Court’s role in redefining the circumstances that render the exclusionary rule applicable); Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 198 (2009) (“[T]he *Herring v. United States* decision’s rationale could arguably support a more general exception to the exclusionary rule that applies to all police conduct, including warrantless searches.”). *But see* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 1–2 (2012) (suggesting that “the exclusionary rule, though limited, is neither dead nor unacceptably constrained” and offering that *Herring* could be read to require exclusion “when negligence has substantially interfered with a suspect’s privacy rights, such as through an illegal arrest or an illegal search of his car or house”).

108 *See* Jacobi, *supra* note 13, at 587 (“The Roberts Court has determined that future application of the exclusionary rule will depend on whether its value in terms of deterring police from constitutional violations is deemed to outweigh the social costs to the justice system.”); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1898 (2014) (“[T]he Court’s ‘pay its way’

Hudson decision where Justice Scalia indicated that the exclusionary remedy should be reserved for cases “where its deterrence benefits outweigh its ‘substantial social costs.’”¹⁰⁹ Three years later, in *Herring*, Chief Justice Roberts asserted that in order for a court to exclude evidence “the deterrent effect of suppression must be substantial and outweigh any harm to the justice system.”¹¹⁰ And two years after that, in *Davis*, Justice Alito explained that “[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”¹¹¹

Under this balancing regime, on the costs side of the scales, the Court will no doubt engage in a searching assessment. As Chief Justice Roberts noted in *Herring*, the “principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free.”¹¹² But that is the *principal cost*; the Court will surely find more room on the scales: Exclusion of evidence subverts the truth-finding mission of the courts,¹¹³ and has the “effect of generating disrespect for the law and administration of justice.”¹¹⁴ It over-incentivizes defense counsel to pursue a Fourth Amendment claim, which clogs the courts¹¹⁵ and misallocates defense resources away from building a client’s

reasoning suggests that the exclusionary rule should apply only in certain limited categories of Fourth Amendment cases, such as when the police engage in outrageous conduct, pursue relatively unimportant criminals, or systematically violate the law.”).

109 *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citations omitted).

110 *Herring v. United States*, 555 U.S. 135, 147 (2009).

111 *Davis*, 564 U.S. at 237. Justice Alito read the Court’s precedents to say that “[w]here suppression fails to yield ‘appreciable deterrence,’ exclusion is ‘clearly . . . unwarranted.’” *Id.* (alteration in original) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

112 *Herring*, 555 U.S. at 141; *see also Davis*, 564 U.S. at 237 (“Exclusion exacts a heavy toll on both the judicial system and society at large . . . [I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.” (citations omitted)); *Hudson*, 547 U.S. at 591 (“The exclusionary rule generates ‘substantial social costs,’ which sometimes include setting the guilty free and the dangerous at large.” (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984))).

113 *See Davis*, 564 U.S. at 237 (observing that exclusion “almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence”); *United States v. Payner*, 447 U.S. 727, 734 (1980) (“Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the *truth-finding* functions of judge and jury.”) (emphasis added)).

114 *Stone v. Powell*, 428 U.S. 465, 491 (1976).

115 *See Hudson*, 547 U.S. at 595 (emphasizing that if exclusion were proper remedy for knock-and-announce violations, it “would generate a constant flood of alleged failures to observe the rule”).

substantive defense.¹¹⁶ In sum, in any game of balancing, the costs of applying the exclusionary remedy will always be quite heavy.¹¹⁷

And on the benefits side of the scales? For now, the Court's search will begin and end with the rule's deterrent impacts on a small set of bad cops. In *Herring*, where the Court first broadly mapped the exclusionary rule balancing regime, the only benefit the Court would put on the scales was "the potential of exclusion to deter wrongful police conduct."¹¹⁸ And, of course, if the exclusionary rule has no discernible deterrent values, how could the benefits of exclusion ever outweigh the costs? You do not need scales to know that a gnat weighs less than a cat. Where we are headed, it sure seems, is the functional demise of the exclusionary rule.

CONCLUSION

There is nothing particularly objectionable about the Court's insistence that the exclusionary rule survive on its utility in fostering constitutional policing. Considering the costs, it is not unreasonable to ask that the rule, in the words of Chief Justice Roberts, "pay its way" in terms of its public policy benefits.¹¹⁹ What is objectionable is the Supreme Court's insistence that the rule's benefits be measured exclusively by its phantom deterrence effect on bad cops in the field.

It doesn't have to be this way. Indeed, one of the appeals of a pure balancing regime is that the Court can dispense with its tortured reliance on the good faith exception to limit the scope of the exclusionary rule. In a true balancing regime, an officer's good faith (or recklessness or malice) can go on the scales with everything else. The challenge for the court is how to unwind thirty years of insisting, as a way of expanding the good faith exception, that the rule turned exclusively on its deterrence values.

It is not so complicated. All the Court need do is announce that when balancing the benefits of exclusion against its social costs, courts should place

116 See Stuntz, *supra* note 64, at 443 ("The exclusionary rule skews criminal trials and criminal appeals by diverting scarce resources into a path separate from the question [of] whether the defendant did the crime."). Some members of the Court would also put intrusion on state autonomy as an important cost. See *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) (Thomas, J., concurring) ("The assumption that state courts must apply the federal exclusionary rule is legally dubious . . .").

117 For a full accounting of the costs from a law and economics perspective, see Jacobi, *supra* note 13, at 589.

118 *Herring v. United States*, 555 U.S. 135, 137 (2009).

119 *Id.* at 147-48.

on the scales all the public policy benefits obtained by the rule, including how exclusionary rule practice provides good cops with the tools they need to do their jobs consonant with Fourth Amendment values.¹²⁰ But that's presuming the Court is interested in a coherent exclusionary rule.

In the old days of boxing, when a promoter wanted to set up an easy win for a fighter, he looked for a “tomato can”—an unworthy opponent who would present little obstacle to a win in the ring. A majority of the modern court grew up in a conservative legal movement deeply hostile to the exclusionary rule. In the exclusionary rule debate, these jurists may have everything to like about the bad cop deterrence theory of the exclusionary rule. It is a tomato can: a policy argument in support of the exclusionary rule so weak that it offers little obstacle to the rule's effective abrogation.

120 In its decisions minimizing the rule's deterrent impacts on officers in the field, the Supreme Court has reserved that exclusion might be appropriate where some “systemic” or “recurrent” police misconduct is at play. See *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (weighing a lack of systemic and recurrent police misconduct into the Court's decision not to exclude evidence); *Herring*, 555 U.S. at 144 (allowing that exclusion may be appropriate where there was “systemic negligence”). However, “[b]eyond incantation of these apparent terms of art, virtually no explanation is provided as to their meaning.” Laurin, *supra* note 61, at 684. Arguably, one could read these reservations as broad enough to capture the values underlying the good cop theory. But it is entirely unclear how a defendant might get these values on the scales. See generally Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 561 (2019) (reviewing challenges an individual defendant will face in presenting proof of recurring or systemic negligence).

